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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1333

PARAMOUNT CONVALESCENT CENTER, INC.,

Petitioner,

vs.

DEPARTMENT OF HEALTH CARE SERVICES, *et al.*,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of California.

ROBERT J. GERST,
LYLE R. MINK,
WEISSBURG AND ARONSON, INC.,
1901 Avenue of the Stars,
Suite 1400,
Los Angeles, Calif. 90067,
Attorneys for Petitioner.

Dated: March 15, 1976.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

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October Term, 1975
No. .....

PARAMOUNT CONVALESCENT CENTER, INC.,
Petitioner,

vs.

DEPARTMENT OF HEALTH CARE SERVICES, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of California.

Paramount Convalescent Center, Inc. (Paramount) prays that a writ of certiorari issue to review the decision of the Supreme Court of California which became final on January 6, 1976.

I.
OPINIONS BELOW.

The opinion of the Supreme Court of California is reported in 15 Cal.3d 489, 125 Cal.Rptr. 265, 542 P.2d 1 and appears as Appendix A hereto. The opinion of the Court of Appeal of California became a nullity upon the granting of a hearing by the Supreme Court. (*People v. Murphy*, 8 Cal.3d 349, 366 n. 13 (1972).) The decision of the Superior Court of California was rendered in the form of a minute order and appears as Appendix B hereto.

II.
JURISDICTION.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3). The opinion of the Supreme Court of California was filed on November 12, 1975. A petition for rehearing was denied on December 17, 1975. Pursuant to Rule 24 of the California Rules of Court, and an order by the supreme court extending the period referred to in that rule,[1] the supreme court's opinion became final on January 6, 1976.

III.
QUESTIONS PRESENTED.

In this case respondent refused to allow Paramount, a skilled nursing facility providing services under the Medicaid program,[2] to continue participating in the program based on unproven allegations of state agents that Paramount failed to comply with certain health regulations. The question presented here is whether a skilled nursing facility is entitled to an administrative hearing prior to such state action.

This question arises in a context where the very existence of most skilled nursing facilities in California, and in all other states except Arizona, depends upon continued participation in the Medicaid program. This situation exists because a substantial number of patients in most skilled nursing facilities are Medicaid beneficiaries and the payments made by the federal and state governments to the facility for care rendered

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[1]The order made and filed on December 2, 1975, stated: "The time for granting or denying a rehearing in the above cause is hereby extended to and including January 9, 1976."

[2]Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, known in California and hereafter sometimes referred to as the Medi-Cal program.

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to such patients comprises a significant percentage of the facility's total revenue. In addition, California and virtually all other states regulate and effectively control the influx of all Medicaid patients into skilled nursing facilities by virtue of the authority given to state agencies to certify such facilities for participation in the Medicaid program. Therefore, a state is able to destroy substantial investments in such facilities by arbitrarily terminating or refusing to renew their participation in the Medicaid program, and there is no way of protecting such interests against destruction other than by means of a prior hearing.

The specific questions presented are:

1. Must a skilled nursing facility providing services under the Medi-Cal program be afforded an administrative hearing on a state's decision denying renewal of an agreement entitling the facility to participate in the program, when the regulations promulgated by the federal and state governments specify that the facility is entitled to participate in the program if certain standards are met?

2. Must a skilled nursing facility which has provided services under the Medi-Cal program since 1968 be afforded an administrative hearing on a state's decision in 1972 denying renewal of an agreement entitling the facility to participate in the program, when the policies and practices of state officials for the four years prior to such nonrenewal were to renew such contracts as a matter of course, and, in any event, did not include termination of such participation by the method of nonrenewal of such agreements?

3. Must a skilled nursing facility providing services under the Medi-Cal program be afforded an administrative hearing on a state's decision denying renewal

of an agreement entitling the facility to participate in the program, when the state's decision is based on the alleged failure of the facility to meet certain health standards and such allegations of noncompliance are disseminated to the press, the members of the community and potential patients?

4. If any of the foregoing questions is answered in the affirmative, is the facility entitled to the hearing prior to termination of its participation in the Medi-Cal program?

IV.

PROVISIONS OF LAW INVOLVED.

The provisions of law involved are set forth in Appendix C hereto.

V.

STATEMENT OF THE CASE.

A. Basic Facts.

In July 1972, shortly before the date for renewal of Paramount's provider agreement[3] entitling it to partic-

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[3]A provider agreement is an agreement required by federal law (45 C.F.R. § 249.33(a)(6)) between the state and a person or institution (known as a provider) rendering health care services in which the provider agrees, among other things, to render health care services and supplies to Medi-Cal beneficiaries in accordance with the provisions of the program. The state, in turn, agrees to certify the provider as being eligible to participate in the Medi-Cal program, which includes the right to receive payment for services rendered. During the period involved here, a state plan for medical assistance under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, was required to provide that, prior to executing a provider agreement with any provider and making any payments thereunder, the state would obtain certification, from the state agency charged with the responsibility for administering the Medi-Cal program, that the facility (a) had fully complied with the standards prescribed by the Secretary of the Department of Health, Education and Welfare or (b) had been determined to qualify as a skilled nursing facility under Title XVIII of the Social Security Act, 42 U.S.C. § 1395 *et seq.*

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ipate in the Medi-Cal program, respondent[4] inspected Paramount's facility and noted that it allegedly failed to meet Medi-Cal regulations in 20 respects. In September 1972 an inspection of the same facilities disclosed 41 alleged noncompliances. Neither the noncompliances alleged in September nor those claimed to exist in July created an emergency situation which jeopardized the health, safety or security of any patient. On October 3, 1972 Paramount submitted a plan of correction[5] of the alleged noncompliances.

On November 15, 1972 Paramount was notified that its provider agreement would not be renewed on November 30, and that payments had been terminated as of October 31, 1972, because of its purported failure to meet Medi-Cal regulations. On November 21 Paramount advised respondent that it was in full compliance with Medi-Cal regulations and demanded a hearing prior to the nonrenewal of its provider agreement. On November 22 respondent conducted an inspec-

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[4]Although the California Department of Health Care Services and the Department of Public Health, which have been consolidated into one department now known as the State Department of Health, and the California Department of Finance were named as respondents in this action, the term "respondent" herein shall refer to the action taken by the State Department of Health.

[5]A state's plan for participation by skilled nursing facilities in the Medicaid program must provide that, following an inspection in which violations of health regulations are claimed, a plan of correction for such noncompliances must be submitted to the inspecting agency as a necessary prerequisite to the facility's continued participation in the program. (45 C.F.R. §§ 249.33(a)(2)(i), 249.33(a)(4)(ii)(B), 249.33(a)(4)(iii)(B).) Such plans must contain the specific steps the facility will take to meet the regulation and a timetable detailing the corrective steps to be taken and when the correction will be accomplished. (45 C.F.R. § 249.33(a)(2)(i).)

tion of Paramount's facility, during which respondent allegedly found 20 noncompliances. Later these 20 noncompliances, which did not jeopardize the health or safety of any patient, were the subject of a plan of correction submitted by Paramount. During this last period respondent made damaging statements to the press, the members of the community, and others concerning Paramount's alleged noncompliances.

Thereafter, respondent refused to renew Paramount's provider agreement and to make further payments for care rendered to patients under the Medi-Cal program. From October 1972 to February 1973 Paramount rendered care to Medi-Cal patients without being reimbursed for such services.

At the time of respondent's action, Paramount was a licensed provider of skilled nursing facility services and had been participating in the Medi-Cal program since 1968 pursuant to a series of provider agreements for periods of one year or less, as required by federal and state law.[6]

On December 29, 1972 Paramount filed a petition for writ of mandamus in the Superior Court of California demanding that its provider agreement be renewed on the ground that its interest in continued participation in the program was protected by the due process clause of the Fourteenth Amendment.

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[6]At the time of respondent's action, Paramount had 49 patients—41 of whom were Medi-Cal beneficiaries—in its 59-bed facility.

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B. Proceedings in the Superior Court.

During the hearing on the alternative writ[7] Paramount contended that it was entitled to an administrative hearing prior to termination from the Medi-Cal program on the issue of whether it was qualified to continue participating in the program. Respondent contended, *inter alia*, that (1) Paramount's participation in the Medi-Cal program was based on certification for a period of one year or less and was in the nature of a contract, and (2) since participation in the program was by contract Paramount had no right to continued participation upon the nonrenewal thereof and was not entitled to a hearing prior to termination from the program.

The superior court determined as matters of law that Paramount's interest in continued participation in the Medi-Cal program was protected by the due process clause, which required a hearing prior to being deprived of such interest. (See Appendix B.) Accordingly, the superior court issued a peremptory writ of mandamus ordering respondent to grant Paramount a hearing at which respondent would be required to prove that Paramount had failed to meet the standards prescribed by law for participation in the Medi-Cal program.

C. Proceedings in the Court Below.

The Supreme Court of California reversed the judgment of the superior court.[8] The court held that

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[7]The alternative writ of mandamus issued by the superior court ordered respondent, among other things, to renew Paramount's provider agreement or, in the alternative, to show cause at a court hearing on February 16, 1973 why it had not done so.

[8]The decision of the Court of Appeal of California affirming

(This footnote is continued on next page)

the Medi-Cal regulations did not justify Paramount's claim of statutory entitlement to renewal of its provider agreement and, thus, to a hearing prior to the nonrenewal of that agreement. In reaching this conclusion, the supreme court made the following observations: (1) The purpose of California regulations implementing the Medicaid program is not to bestow a benefit upon the nursing homes which provide services to Medi-Cal recipients but, rather, to protect the patients. (15 Cal.3d at 496-497; Appendix (hereafter App.) at A-8.) (2) The difference between the instant case and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) and *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) is that in those cases the chief beneficiary of the entitlement was the person claiming the right to the hearing, whereas here the "entitlement" is not intended to benefit the party demanding the hearing. (15 Cal.3d at 497; App. at A-9.) (3) "The cancellation of a contract during its term requires notice and hearing in accordance with section 11500 *et seq.* of the Government Code (Welf. & Inst. Code § 14123), and the one-year limitation was designed to avoid the necessity of deferring the withdrawal of Medi-Cal funds from a facility which is in patent violation of the regulations until a full hearing can be held regarding the charges of noncompliance." (15 Cal.3d at 498; App. at A-10.) (4) If such a hearing were afforded Paramount, respondent would be unable to comply with the one-year limitation imposed on provider agreements by

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the judgment became a nullity when the supreme court granted respondents' petition for hearing. (See p. 1, *supra*.)

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federal law. (15 Cal.3d at 497; App. at A-9.) (5) The court was not aware of any understanding or practice of respondent in renewing provider agreements as a matter of course, which made this case distinguishable from *Perry*, where the regulations as well as practices of the college supported the teacher's claim of *de facto* tenure. (15 Cal.3d at 498; App. at A-10.) (6) The thrust of the hearing sought by Paramount was not to enable it to clear its name so that it could attract patients outside the Medi-Cal program, but to participate in the program itself; therefore, Paramount was seeking the renewal of a financially lucrative contract, not moral vindication. (15 Cal.3d at 500; App. at A-13.)

The dissent, concluding that Paramount was entitled to a hearing prior to nonrenewal, stated the majority had conceded that a skilled nursing facility was *entitled* to participate in the Medi-Cal program if it met certain standards, but had improperly superimposed an additional requirement—neither contemplated by the federal cases nor reconcilable with them—that the entitlement arise from a program designed to benefit the party asserting it. The dissent observed that the fact Paramount was not the intended beneficiary of the statutory entitlement was inconsequential and that the only conceivable basis for the majority's opinion was the untenable theory that some entitlements are not property. (15 Cal.3d at 504; App. at A-19.)

The dissent also noted that it was not realistic for the majority to state that granting a hearing to Paramount would preclude compliance with statutory requirements, demonstrating that such was not the case, and since no emergency had been shown, Para-

mount was entitled to a hearing prior to the expiration of its provider agreement. (15 Cal.3d at 506-507; App. at A-23, 24.)

VI.
REASONS FOR GRANTING THE WRIT.

This case presents the question of whether respondent, which has complete control over the continued existence of all skilled nursing facilities participating in the Medi-Cal program, should be allowed to take certain action which effectively terminates such participation without a prior hearing. The outcome of this case will determine, for all practical purposes, whether California will be allowed to destroy the business of a skilled nursing facility based on *unproven* allegations of state agents that the facility has not complied with certain health regulations, despite the fact that such alleged noncompliances do not jeopardize the health or safety of any patients. Finally, it is clear that the state and federal courts are in need of an authoritative declaration from this Court concerning the scope of the due process clause in context presented here.

A. The Decision of the California Supreme Court Conflicts With Decisions of This Court and a Federal District Court.

1. The Decision of the California Supreme Court Conflicts With Constitutional Principles Enunciated by This Court.

The decision of the California Supreme Court conflicts with the principles set forth in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548

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(1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The treatment of *Goldberg* in *Roth* and *Perry*, however, makes a separate discussion of *Goldberg* unnecessary at this point.

In *Roth* this Court stated that property interests:

> ". . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so." (408 U.S. at 577, 92 S.Ct. at 2709, 33 L.Ed.2d at 561.)

Distinguishing the foregoing language, the California Supreme Court stated that § 51215 of Title 22 of the California Administrative Code (App. at C-2) did not constitute a rule which would support Paramount's claim of entitlement because that regulation was not intended to benefit Paramount and, further, if respondent were required to afford Paramount a hearing it would be impossible in many cases to limit provider agreements to one year as required by federal regulations. (15 Cal.3d at 497-498; App. at A-9.) However, the court's statements overlook the fact that the term of a provider agreement may be extended for up to 60 days when it appears that the health and safety

of the patients will not be jeopardized thereby and that such extension is necessary to prevent irreparable harm to the facility. (45 C.F.R. § 249.33(a)(6).)[9] In addition, the Secretary of the Department of Health, Education and Welfare has expressly allowed the states to adopt their own appeals procedures in connection with agreements that have not been renewed,[10] which would permit California to extend the certification process beyond one year.

Therefore, *Paramount* is in conflict with *Roth* because this Court has not imposed a requirement that the person claiming a due process hearing must be the chief beneficiary under the statute on which the demand for hearing is based. As the dissent in *Paramount* correctly notes (15 Cal.3d at 504; App. at A-19), the fact that a person other than the chief beneficiary claims the right to the hearing does not transform what has already been determined to be an entitlement into something less. Indeed, none of the decisions of this Court support the supreme court's distinction. In addition, the practical problems associat-

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[9]Section 249.33(a)(6) also provides that such term may be extended when it is impracticable within the term of the provider agreement to determine whether such facility is complying with the provisions and requirements of the program. In addition, 45 C.F.R. § 249.10(b)(4)(i)(B) allows a facility to obtain federal payments for 30 days following the expiration of a provider agreement, irrespective of the 60-day extension allowed by 45 C.F.R. § 249.33(a)(6).

[10]In his comments preceding the promulgation of certain amendments to Part 405 of Title 20 and Part 249 of Title 45 of the Code of Federal Regulations, the Secretary stated:

> "(4) Request was also made that Medicaid provide hearings for all facilities that had been terminated or where agreements had not been renewed. This appeals process will be determined by State practices consonant with Medicaid being a State-administered program." (39 Fed.Reg. 2238 (Jan. 17, 1974).)

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ed with granting a hearing have no bearing on whether there should be a hearing in the first instance, but only on the form of the hearing. (See *Board of Regents of State Colleges v. Roth*, 408 U.S. at 570, 92 S.Ct. at 2701, 33 L.Ed.2d at 557.)

This Court's reason for denying the liberty claim of the university professor in *Roth* were as follows:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. . . . Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' . . .
>
> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. . . . For '[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury. . . .'" (408 U.S. at 573-574, 92 S.Ct. at 2707, 33 L.Ed.2d at 558-559; footnote and citations omitted.)

The California Supreme Court distinguished the foregoing language of *Roth* on the ground that a determination by respondent that Paramount failed to comply with health regulations was not equivalent to a charge of incompetence or immorality. (15 Cal.3d at 499; App. at A-12.) But even if such a charge were in-

volved, the court continued, the hearing sought by Paramount was not for the purpose of clearing its name so that it could attract patients outside the Medi-Cal program, but, rather, for the purpose of participating in the program itself. (15 Cal.3d at 500; App. at A-13.) These statements ignore the realities of this case. During the period in question, respondent told the press, members of the community, and potential patients about Paramount's alleged noncompliances with health regulations. Such disclosures made it impossible to sell or lease the facility. Thus, the purpose of the hearing sought by Paramount was not only to obtain renewal of its provider agreement, but also to protect its name and reputation in the community.

The decision of the California Supreme Court also conflicts with *Perry v. Sindermann*, where this Court stated:

> "A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient cause is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in reemployment. . . . Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' . . . And, '[t]he meaning of [the promisor's] words and acts is

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found by relating them to the usage of the past.' . . .

"A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service —and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a 'common law of a particular industry or of a particular plant' that may supplement a collective bargaining agreement . . . so there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university . . . that has no explicit tenure system even for senior members of its facility, but that nonetheless may have created such a system in practice." (408 U.S. at 601-602, 92 S.Ct. at 2699-2700, 33 L.Ed.2d at 580.)

The California Supreme Court distinguished the foregoing language in *Perry* by stating:

"In the present case, by contrast, the applicable regulations informed Paramount that the renewal of its contract depended upon a *determination* that it comply with certain regulations, and not only was there an absence of a *promise* of a due process hearing prior to nonrenewal, but pragmatically such a hearing could not occur before expiration of the contract term." (15 Cal.3d at 498-499; App. at A-11; emphasis added.)

The supreme court's distinction is illusory. First, the court's reference to the "determination" of compliance with applicable regulations is, in reality, the "good cause" which respondent was required to show at a hearing prior to terminating Paramount from the Medi-Cal program. Second, none of the decisions of this Court require the "promise" of a due process hearing required by the California Supreme Court. Third, the regulation referred to by the court was not in existence prior to 1972, the year in which respondent terminated Paramount's participation in the Medi-Cal program.

2. The Decision of the California Supreme Court Conflicts With the Decision of a Federal District Court Involving a State's Action Terminating a Provider's Participation in the Medicaid Program.

By holding that Paramount did not have a property interest in the renewal of its provider agreement, because it was not the chief beneficiary of the entitlement, the decision of the California Supreme Court conflicts with *Ross v. State of Wisconsin Dept. of Health & Social Serv.*, 369 F.Supp. 570 (E.D. Wisc. 1973).[11]

In *Ross* skilled nursing facilities challenged the constitutionality of a statute which provided for immediate removal of patients receiving state aid upon a determination that the failure to comply with certain standards endangered their health and safety. The court held that the facilities, in the absence of an emergency, were entitled to a hearing prior to the removal of their patients on the question of whether they were

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[11]The court stated that the reasoning in *Ross* was not persuasive because it did not involve the failure to renew a provider contract upon its expiration. (15 Cal.3d at 500; App. at A-14.)

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in compliance with applicable health laws. Thus, the effect of the holding was that the facilities had a property interest in retaining their patients and, therefore, had standing to challenge the state statute even though the patients were the direct recipients of its benefits.

B. The California Supreme Court, in Holding That a Provider of Health Care Services Participating in the Medi-Cal Program Is Not Entitled to a Hearing Prior to the State's Action Terminating Such Participation, Has Decided an Important Question of Federal Law Which Had Not Been, but Should Be, Settled by This Court.

1. Respondent's Action in Terminating Paramount's Participation in the Medi-Cal Program Deprived Paramount of Its Liberty Without Due Process of Law.

In *Wisconsin v. Constantineau,* 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515, 519 (1971), this Court stated:

> "[w]here a person's good name, [or] reputation . . . is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Also, this Court in *Roth, supra,* suggested that the university professor in that case might have been entitled to a hearing prior to termination if the state made charges against him that could have seriously damaged his standing and associations in his community, placed his good name or reputation at stake, or imposed on him a stigma or other disability that foreclosed his range of opportunities in a manner that contravened due process. (408 U.S. at 573-574, 92 S.Ct. at 2707, 33 L.Ed.2d at 559.)

Here, Paramount had been participating in the Medi-Cal program since 1968 pursuant to a continuous string of provider agreements, each of which had a term of one year or less. Since 1968, therefore, Paramount had an established reputation in the community for meeting the standards for participation in the Medi-Cal program promulgated by respondent and the federal and state governments. Respondent's claim that Paramount was not qualified to participate in the Medi-Cal Program, because it had failed to comply with certain health regulations, were charges which put its reputation in issue and damaged its standing in the community. Thus, respondent should have been required to afford Paramount a hearing prior to termination of its participation in the Medi-Cal program; such a hearing was the *only* means by which Paramount could attempt to prevent its business from being destroyed by arbitrary government action.

In *Ross v. State of Wisconsin Dept. of Health & Social Serv., supra,* although the majority opinion did not decide whether the liberty interests of the plaintiff nursing homes were implicated, the concurring opinion stated:

> "The plaintiffs are entitled to a hearing on the issue of their respective homes being a healthful and safe place *because their liberty is put in jeopardy in that their 'standing and associations in [the] community' may be seriously damaged by an adverse determination of this issue.* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972). *A determination by the Government that a nursing home is unsafe or unhealthy not only*

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> *damages its standing in the community but also prejudices its ability to attract and retain private patients and thus puts its very existence in jeopardy*. Under these circumstances the due process clause of the 14th Amendment prohibits the state from damaging plaintiffs' reputation by making this adverse determination even if county patients are not withdrawn. Such a determination or finding cannot be made without providing some procedural safeguards. *Roth*, supra; see also Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971). . . . Although the nursing homes here have no 'tenured' status, they do have their reputation at stake, and the Government's act of finding them unsafe and unhealthy seriously damages their reputation and ability to function. Such decisions on the part of Government cannot be done arbitrarily." (369 F.Supp. at 573; emphasis added.)

The Supreme Court of California distinguished that portion of *Ross* which cited *Roth* by stating that the reason for seeking the hearing in *Roth* was to avoid damage to opportunities for employment in other schools, whereas, here, the reason for seeking the hearing is "not to enable . . . [Paramount] to clear its name so that it may attract patients outside the Medi-Cal program, but to participate in the program itself." (15 Cal.3d at 500; App. at A-13.)

The court's distinction disregards the realities of the case. Respondent's statements to the press, members of the community and others placed Paramount's reputation in issue and made it impossible to attract Medi-

Cal and private patients (whose payments help to defer fixed costs) or to sell or lease the facility. In view of its discredited status in the community, the latter may have been Paramount's only alternative. Thus, while continued participation in the Medi-Cal program may have been a major concern of Paramount, it had other important reasons for seeking a hearing—it was being deprived of its liberty. Accordingly, a hearing was required to comply with the due process clause.

2. The California Supreme Court Has Held That Paramount's Interest in the Renewal of Its Provider Agreement Was Not a Property Interest Protected by the Due Process Clause.

Although the decision of the California Supreme Court recognizes that a skilled nursing facility is entitled to participate in the Medi-Cal program under certain circumstances, it nevertheless states that Paramount had no property interest in the renewal of its provider agreement because Paramount was not the chief beneficiary of the entitlement. (15 Cal.3d at 497; App. at A-9.) This notion, however, is contrary to the principles of due process enunciated by this Court. As the dissent correctly points out:

> ". . . The due process clause protects all property; the fact that the property arose from a government program designed primarily to benefit someone else is, perforce, inconsequential. The only conceivable basis for the majority's opinion would be the untenable theory that some entitle-

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> ments are not property. *Roth* surely put that hypothesis to rest. . . . *Roth* bottomed its conclusion that legitimate claims of entitlement merit due process protection squarely on notions of reliance—not of effecting statutory goals. Considerations of fairness and the realities of the marketplace both impel the conclusion that nursing homes rely upon the government's compliance with regulations that have impact upon those homes, even if the regulations are designed to benefit third parties." (15 Cal.3d at 504; App. at A-19, 20.)

The majority opinion also overlooks the obvious fact that services of skilled nursing facilities are contemplated by the Medicaid program; the very operation of the program depends on the rendition of health care services by such third parties.

In addition, the court's concern over the well-being of patients, although entirely proper, has no basis because California has several effective weapons to protect, on an immediate basis, the patients whose health and safety is claimed to be in jeopardy.[12]

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[12]For example, in cases where respondent feels that the health or safety of patients is in jeopardy, it is empowered to suspend or revoke a facility's license (Calif. Health & Saf. Code § 1294 *et seq.*); it may also enjoin further operation of the facility (Calif. Health & Saf. Code § 1430).

(a) Paramount Has a Legitimate Claim of Entitlement to Participate in the Medi-Cal Program, Based on the Rules Promulgated by Respondent and by the Federal Government, in Addition to the Policies and Practices of Respondent Concerning Such Participation.

(i) The Rules Promulgated by the Federal Government and the Policies and Practices of Respondent Prior to April 1972 Justify Paramount's Claim of Entitlement to Continued Participation in the Medi-Cal Program.

Prior to April, 1972, § 249.33(a)(6) of Title 45 of the Code of Federal Regulations required a state participating in the Medicaid program to execute agreements with facilities qualified to participate in the program. Section 249.33(a)(6) further provided, in part:

> "Execution of a provider agreement shall be for the term and in accordance with the provisions of certification determined by the survey agency except that the single State agency for *good cause* based on adequate and documented evidence may elect . . . not to execute a provider agreement . . . for participation by a facility certified under the State plan." (Emphasis added.)

Thus, the federal regulations concerning provider agreements recognized that good cause was required if a state elected not to enter into a provider agreement with a facility already participating in the Medicaid program.

California, however, had no regulations prior to April 1972 with specific provisions concerning the execution of provider agreements. During that period, it was the practice of respondent to renew the provider agree-

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ments of Paramount and other skilled nursing facilities on a regular basis. Indeed, respondent has not denied that it was not the practice to renew such agreements as a matter of course and has pointed to no instances of termination by nonrenewal prior to the one in issue here.

In addition, unless respondent sought to suspend or revoke a facility's license, which required a prior evidentiary hearing (Calif. Health & Saf. Code § 1295; Calif. Govt. Code § 11500 *et seq.*), no action was taken against the facility's provider agreement. Even if respondent would have sought, by action unconnected with the facility's license, to terminate the facility's participation in the Medi-Cal program during the course of its provider agreement, respondent was required to afford the facility a hearing. (Calif. Welf. & Inst. Code § 14123.)

Therefore, respondent's practice of renewing agreements as a matter of course, and affording hearings when it terminated a facility's participation for failure to comply with Medi-Cal regulations, amounted to an "unwritten common law" (*Perry v. Sindermann, supra*) that such facilities (a) would have their agreements renewed if they were in compliance with applicable health regulations and (b) would be afforded a hearing on the charges of noncompliance if their participation was terminated for failure to comply with such regulations.[13]

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[13]Prior and subsequent to April 1972 determinations of compliance with the regulations were required to be made. (42 U.S.C. § 1396a.) A hearing upon suspension was provided by California law. (Calif. Welf. & Inst. Code § 14123; Calif. Govt. Code § 11500 *et seq.*) (See App. C, *infra.*)

(ii) The Regulation Promulgated by Respondent in April 1972 Justified Paramount's Claim of Entitlement to Continued Participation in the Medi-Cal Program.

Paramount's understanding that its provider agreement would be renewed in 1972, and that it would receive a hearing if respondent terminated its participation from the Medi-Cal program for failure to meet Medi-Cal standards, was also based on the regulations promulgated by respondent.

In April, 1972, § 51215 of Title 22 of the California Administrative Code was amended to read, in relevant part, as follows:

"(a) A nursing home shall . . .

". . .

"(12) Enter into a participation agreement with the Department of Health Care Services that the facility is in compliance with the provisions of this section. The participation agreement with the Department shall remain in effect no longer than the period of certification established under (a)(12)(b) of this Section or one year whichever is less. *New agreements shall be authorized only upon determination by the Department that the nursing home continues to meet the standards set forth in this Section.*

". . .

"(B) A nursing home *shall* be certified to participate in the Medi-Cal Program when it is determined that the nursing home meets the standards for participation as set forth in this Section. . . .

". . ."

Therefore, Paramount was entitled to participate in the Medi-Cal program if it met the standards for certifi-

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cation, or if there was a reasonable prospect that the alleged deficiencies could be corrected within six months (see App. C-3, 4); a determination that such standards had not been met constituted good cause to terminate Paramount's participation in the program (45 C.F.R. § 249.33(a)(6)), but such a determination could not be made accurately without the aid of a hearing (see part (b), *infra*).

Any other method of terminating Paramount's participation in the Medi-Cal program required respondent to afford Paramount a prior hearing. Section 14123 of the California Welfare and Institutions Code, § 11500 *et seq.* of the California Government Code and §§ 51452 and 51453 of Title 22 of the California Administrative Code (see App. C, *infra*) provided that if Paramount was suspended from the Medi-Cal program for the violation of any regulation relating thereto, it would be afforded a hearing on the charges of noncompliance. As noted above, it is clear that respondent devised the concept of "nonrenewal" to circumvent this hearing requirement. However, it makes no difference whether termination from the Medi-Cal program is effected by means of a "suspension" or a "nonrenewal", because the end result is the same.

(b) Paramount Is Entitled to a Hearing Prior to Termination of Its Participation in the Medi-Cal Program.

The foregoing law and regulations required respondent to enter into a provider agreement, or, in this case, to renew such an agreement, unless respondent could show Paramount failed to meet the standards of the Medi-Cal program.[14] However, the only method

[14]The addition of subparagraph (a)(12) to § 51215 in or about April 1972 was nothing new; it merely expressed what had been respondent's practice prior to that date.

of determining the validity of such good cause, and whether the government had acted capriciously, was by means of a hearing. (*Goldberg v. Kelly*, 397 U.S. 254, 269-270, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287, 300 (1970); *Elliott and Molina v. Weinberger*, Civil Nos. 74-1611, 74-3118 (9th Cir., filed Oct. 1, 1975).) On this issue the California Supreme Court stated:

> "[T]he one-year limitation [on provider agreements] was designed to avoid the necessity of deferring the withdrawal of Medi-Cal funds from a facility which is in patent violation of the regulations until a full hearing can be held regarding the charges of noncompliance." (15 Cal.3d at 498; App. at A-10.)

Thus, the court assumed as true the precise issue required to be determined at a hearing, namely, the violation of health regulations. Such an assumption is especially unfortunate in this case because respondent effectively controls the flow of all Medi-Cal beneficiaries to skilled nursing facilities participating in the program and is able to destroy the business of any facility merely by terminating its participation in the Medi-Cal program for failure to comply with applicable regulations.

Factual disputes concerning whether Paramount was in compliance with certain regulations and the credibility of the persons claiming noncompliance could only be made at a hearing. As this Court stated in *Greene v. McElroy*, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377, 1390-1391 (1959):

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures

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> an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny. [Citations.]"

In *Elliott and Molina v. Weinberger, supra,* a case involving recoupment of monies paid to Social Security beneficiaries allegedly in excess of their legal monthly entitlements, the court held that a hearing prior to recoupment is constitutionally compelled unless the issues raised in a recipient's request for review are incapable of resolution upon written submission or documentary proof. The court stated:

> "It is obvious that resolution of those factual disputes could only be made at an oral hearing where the trier of fact could evaluate the credibility of a claimant. As the court noted, where credibility and veracity are at issue, as they must [be] in many termination proceedings, written submissions are a wholly unsatisfactory basis for a decision." (Slip Opinion at p. 24.)

The foregoing principles apply to the instant case. Under the present system in California, the power of skilled nursing facility inspectors is awesome. When charged with the failure to comply with health regulations there is little a facility can do to convince respondent that its action is improper. And, if facilities do not agree to ameliorate noncompliances alleged by respondent, on the ground they do not exist, or if they claim corrective action has been taken but the inspector disagrees, a facility may be, and oftentimes is, subject to further proceedings which affect its very existence (*e.g.*, license revocation, suspension from Medi-Cal program).[15] Under such circumstances, it becomes important to ensure that the persons inspecting a particular facility do not have faulty perception, or are not motivated by malice, vindictiveness, intolerance or prejudice. The only effective method for doing so is by affording the facility a hearing.

Characterizing Paramount's termination from the Medi-Cal program as resulting from the "nonrenewal of its provider agreement" subordinates substance to form. In California, a substantial percentage of the patients in skilled nursing facilities are Medi-Cal beneficiaries; here, 41 of Paramount's 46 patients had such status. Therefore, whether cutting off the flow of Medi-Cal funds is accomplished by way of "suspension", "license revocation", or "nonrenewal" of a provider agreement, such action effectively terminates participation in the program; such action also impairs

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[15]As noted above, action to revoke a facility's license or to suspend its participation in the Medi-Cal program requires a prior hearing.

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or destroys the business of such facilities because the continued existence of their business depends on the funds received from participation in the program.

It is apparent that respondent sought to circumvent the requirement of a hearing upon suspension from the program by waiting until the end of the provider agreement's term, characterizing their action as a non-renewal. The unfairness of this practice becomes more evident when one considers the fact that a state must be afforded a hearing if the federal government elects to withhold Medicaid payments from it (42 U.S.C. § 1396c), and, in addition, a Medicaid beneficiary is entitled to a hearing prior to the time funds are withheld from him. (45 C.F.R. § 205.10.) There appears no good reason to deny a skilled nursing facility such a hearing when its participation in the Medicaid program is terminated.

As noted by the dissent (15 Cal.3d at 505; App. at A-21), the statements made by the majority concerning administrative and fiscal difficulties connected with the granting of a hearing to Paramount are relevant only when considering the form of the hearing, not whether it should be afforded in the first instance. And, as this Court stated in *Bell v. Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90, 96 (1971):

> "[I]t is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate . . . [a protected] interest . . . it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." (Emphasis in original; footnote omitted.)

Since this case does not involve an emergency situation, and since respondent's claims of difficulty in complying with regulations are exaggerated (15 Cal.3d at 506; App. at A-24), Paramount was entitled to a hearing prior to the nonrenewal of its provider agreement.

VII.
CONCLUSION.

The decision of the California Supreme Court is in conflict with the principles of due process enunciated by this Court and a federal district court. It raises an important question of federal law concerning the fairness of the procedures used to terminate a skilled nursing facility's participation in the Medicaid program. In sanctioning such termination without affording such facilities a prior administrative hearing, the California Supreme Court has given respondent the power to destroy the business of such facilities based on unproven allegations of state agents that the facility has not complied with certain health regulations.

The petition for certiorari should be granted.

Respectfully submitted,

ROBERT J. GERST,
LYLE R. MINK,
WEISSBURG AND ARONSON, INC.,
Attorneys for Petitioner.

Dated: March 15, 1976.

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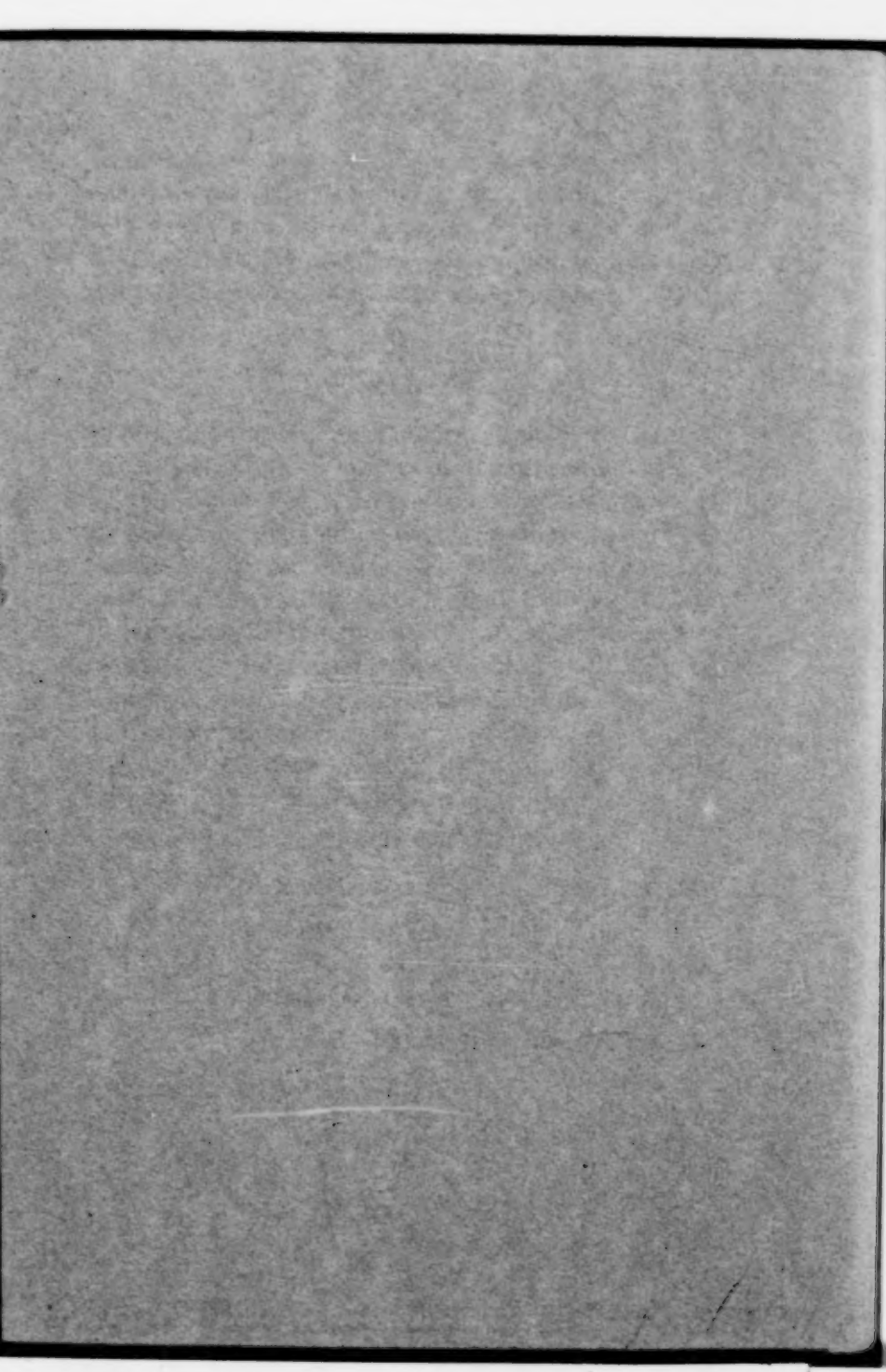

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APPENDIX A.

Opinion.

(Filed November 12, 1975).

In the Supreme Court of the State of California, In Bank.

[L.A. No. 30413. In Bank. Nov. 12, 1975.]

Paramount Convalescent Center, Inc., Plaintiff and Respondent v. Department of Health Care Services et al., Defendants and Appellants; Department of Finance, Real Party in Interest and Appellant.

Counsel

Evelle J. Younger, Attorney General, Elizabeth Palmer, Assistant Attorney General, Edward M. Belasco and James E. Ryan, Deputy Attorneys General, for Defendants and Appellants and for Real Party in Interest and Appellant.

David N. Rakov for Plaintiff and Respondent.

Trope & Trope, Eugene L. Trope, Stephen S. Monroe, Weissburg & Aronson, Robert J. Gerst and Lyle R. Mink as Amici Curiae on behalf of Plaintiff and Respondent.

Opinion

MOSK, J.—The sole issue in this proceeding is whether due process compels the Department of Health Care Services[1] to grant a hearing to a nursing home prior

[1]The State Department of Health is the successor to both the former Department of Health Care Services and the former Department of Public Health, respondents below. The term "department" as used hereinafter refers to either the named respondents or the successor agency. The Department of Finance, which made payments under the contracts, is the real party in interest.

to a determination by the department not to renew a contract with the facility for the care of patients entitled to Medi-Cal benefits.

Paramount Convalescent Center, Inc. (hereinafter Paramount) as a nursing home licensed by the state (Health & Saf. Code, § 1250 et seq.) and, from 1968 until December 1972, it provided health care services to recipients of Medi-Cal benefits (Welf. & Inst. Code, § 14000 et seq.) under annual contracts with the department. Most of the funds paid to Paramount under this program are received by the state from the federal government, and as a condition of participating in the program, the department must assure that a nursing home complies with federal standards.

Each contract provided that Paramount would render skilled nursing services to Medi-Cal patients in accordance with Medi-Cal regulations (Cal. Admin. Code, tit. 22, § 51215), and that if Paramount failed to comply with these regulations in any respect it would correct the deficiencies. The department, in turn, agreed to certify Paramount as a participant in the Medi-Cal program. These provider contracts are limited by both state and federal regulations to one year (Cal. Admin. Code, tit. 22, § 51215, subd. (a)(12); 45 C.F.R. § 249.33, subd. (a)(6)), although federal regulations provide that a two-month extension may be granted under certain circumstances.[2]

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[2]Under federal law, a two-month extension is appropriate if it appears that "the health and safety of the patients will not be jeopardized thereby, and that such extension is necessary to prevent irreparable harm to such facility or hardship to the individuals being furnished items or services or that it is impracticable within such provider agreement period to determine whether such facility is complying with the provisions and requirements under the program." (45 C.F.R. § 249.33(a)(6).)

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In July 1972, shortly before expiration of a contract with Paramount, the department inspected Paramount's facilities and notified it that the institution failed to meet Medi-Cal standards for nursing homes in 20 specific respects, including the failure to keep adequate patient charts or to follow physicians' orders, and deficiencies in the physical facilities such as hazardous electrical wiring and extremely hot water in the plumbing fixtures used by the patients. A subsequent inspection in September revealed 41 alleged deficiencies. Paramount was notified on November 15 that Medi-Cal payments would be terminated because of its failure to comply with the specified regulations. On November 21, Paramount advised that it was in full compliance with the regulations and demanded a hearing prior to the department's refusal to execute another contract. An inspection on November 22 resulted in 20 reported deficiencies.[3] After both the September and November inspections, Paramount submitted a plan of correction.

The department refused to make further payments to Paramount or to execute another contract,[4] and Paramount sought a writ of mandate to compel renewal. It was alleged that Paramount was in actual or substantial compliance with Medi-Cal requirements, and that the department must afford Paramount an opportunity at a hearing to so demonstrate before terminating payments. Paramount also asserted that 41 of the 46 patients at its facility were beneficiaries under the Medi-Cal program, and that it would be forced to quit business if no new contract was forthcoming.

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[3]Many of the alleged defects violated licensing regulations as well.

[4]The department entered into conditional, short-term contracts with Paramount up to December 21, 1972.

The trial court issued an alternative writ. Ultimately, without deciding whether or not Paramount's allegation of compliance was meritorious, the court determined that Paramount was entitled to a hearing on whether it met the standards prescribed by law, and a peremptory writ was issued ordering the department to grant such a hearing. The court found that Paramount had a significant interest in not being disqualified from participation in the Medi-Cal program, and that due process required that it be afforded a hearing on that issue prior to being deprived of the interest.[5]

We initially inquire whether Paramount had a property right in the renewal of its contract, or a mere expectancy or unilateral hope of renewal. In *Board of Regents v. Roth* (1972) 408 U.S. 564, 577 [33 L.Ed.2d 548, 561, 92 S.Ct. 2701] it was said: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."

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[5]The trial court explained the reasons for its decision as follows: Although Paramount may not have a property right in renewal of the contract, its interests were substantially affected by the department's failure to renew the agreement, since its business depended upon such renewal. A hearing might not be required if the failure to renew was due to a reason not personal to Paramount, such as lack of funds or a surplus of nursing homes, but since the contract was not renewed because of Paramount's alleged failure to comply with the regulations, a hearing is required.

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In *Roth*, as in the present case, the basis of the property right was a one-year contract. The respondent, a nontenured professor hired for one academic year, was informed that he would not be rehired the next year. The court held that he was not entitled to a hearing as to the reasons for the university's failure to reemploy him because he had no possible claim to entitlement to reemployment. There was no statute or university rule or policy which secured such an interest or created any legitimate claim to it; thus the respondent had only an abstract claim in being rehired but no property interest sufficient to require a hearing.

By contrast, in the companion case of *Perry v. Sindermann* (1972) 408 U.S. 593 [33 L.Ed.2d 570, 92 S.Ct. 2694], the court held that a teacher who had been rehired under one-year contracts for ten successive years by a state college system must be afforded the opportunity to demonstrate that he had a property interest in reemployment and thus a right to a hearing as to the reasons for the refusal to rehire him. The court reasoned that, despite the fact that he had only a one-year employment contract, the college rules, regulations, and understandings might justify a legitimate claim to entitlement to continued employment, absent sufficient cause. (Also see *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 830-831 [114 Cal.Rptr. 589, 523 P.2d 629].)

Likewise, *Goldberg v. Kelly* (1970) 397 U.S. 254 [25 L.Ed.2d 287, 90 S.Ct. 1011], held that since welfare benefits were a matter of statutory entitlement, due process requires a hearing as a condition of termination, and that since the welfare recipient is destitute

without such aid, the hearing must be afforded prior to the time the benefits are withdrawn.

Our decision as to whether Paramount was entitled to a hearing prior to the department's refusal to renew its contract must, under the rationale of these cases, turn upon whether the statutes, regulations and policies applicable to nursing home provider contracts demonstrate that Paramount had a legitimate claim of entitlement to a new contract, i.e., a property right of which Paramount could not be deprived without a hearing, or whether it had a mere expectancy or hope that future contracts would be forthcoming.

We turn, then, to the regulations under which the Medi-Cal program functions. Title 19 of the Social Security Act (42 U.S.C. § 1396 et seq.) provides for a medical assistance program financed largely by federal funds but administered by the states. The federal government makes payments to the states for the purpose of maintaining patients under the program in nursing homes. As we have seen, federal law limits provider contracts to one year, with a two-month extension under certain circumstances. (See fn. 2, *ante*.) Prior to executing a contract with a nursing home, the state must assure that the home is licensed, must certify that it meets the standards set forth in the federal regulations (45 C.F.R. § 249.33(a)(1)(i)), and inspect the facility at least once a year to assure compliance with the regulations. (45 C.F.R. § 250.23 (a)(2)(iii).)

California has implemented the federal requirements in the Medi-Cal Act (Welf. & Inst. Code, § 14000 et seq.) and the regulations promulgated thereunder in title 22 of the California Administrative Code. Under

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these regulations, a nursing home is entitled to participate in the Medi-Cal program if it meets the standards set forth in section 51215 of that title. (Cal. Admin. Code, tit. 22, § 51451.) Section 51215 provides that participation is conditioned upon licensing by the state and compliance with federal and state regulations. In the event of such compliance, the nursing home "shall" enter into a contract of one year or less with the department, and subsequent agreements are conditioned upon a determination by the department that the facility continues to meet those standards. The manifest intent of both the state and federal regulations is to assure that Medi-Cal recipients be cared for only in nursing homes which meet the standards set forth therein.

The department asserts that these regulations do not afford Paramount a property right beyond the period of the contract, nor a legal expectancy that the contract will be renewed after its expiration date, that the state is in the same bargaining position with respect to a nursing home as it is vis-a-vis a commercial supplier of goods or services, and that the renewal of a provider contract constitutes a new agreement which the state is free to refuse without a hearing. The department also contends that if, as Paramount asserts, a hearing must be afforded before a determination not to renew a provider agreement is effective, the one-year limitation specified by the federal regulations could not be met and therefore millions of dollars in federal grants would be lost to the state.

Paramount urges, on the other hand, that it is entitled to a renewed contract under sections 51215 and 51451 of the California regulations, and may not be deprived of that right without notice and a prior hearing to determine the question of compliance.

In our view, the regulations described above do not justify Paramount's claim of entitlement to a new provider agreement.

We consider, first, Paramount's assertion that because the California regulations provide that any nursing home which complies with the regulations may participate in the Medi-Cal program (§ 51451) and that the department and a nursing home "shall" enter into a contract (§ 51215), every qualified nursing home has a statutory entitlement to a contract and thus to a hearing prior to nonrenewal. We reject this concept.

At first blush these mandatory provisions lend encouragement to Paramount. But the purpose of the provisions is not to bestow a benefit upon the nursing homes which provide services to Medi-Cal recipients; it is to protect the patients. Both federal and state law emphasize that the basic premise of government-supported health programs including the Medi-Cal program, is to afford recipients the widest possible choice of qualified care facilities. (42 U.S.C. § 1395a; Welf. & Inst. Code, § 14000, subd. (b); *California Medical Assn. v. Brian* (1973) 30 Cal.App.3d 637, 642 [106 Cal.Rptr. 555].) Thus, the provisions in question assure that the department will not refuse to pay for a Medi-Cal beneficiary's care in a nursing home of his own choosing for reasons unrelated to his welfare, such as the administrative convenience of the department.

In this respect, the posture of Paramount is different from that of the welfare recipient in *Goldberg v. Kelly, supra*, 397 U.S. 254, or the teacher in *Perry v. Sindermann, supra*, 408 U.S. 593. In those cases the chief beneficiary of the entitlement was the person who

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claimed he had the right to a hearing before being deprived of certain benefits, whereas, here the "entitlement" is not intended to benefit the party which demands the hearing. Since Paramount is not the primary beneficiary of the "entitlement" in section 51215, the rationale of the cases cited above does not compel a holding that it has a right to a prior hearing.

Another significant factor in assessing Paramount's argument is that section 51215 would be rendered internally inconsistent if we were to hold that a nursing home is entitled to a hearing prior to the department's refusal to renew a provider contract. For it would be impossible in many cases to honor the requirement of the section that a contract be limited to one year and that no new contract may be executed unless a nursing home complies with the regulations while at the same time requiring a hearing prior to the refusal to renew.

Obviously, a nursing home's facilities must be inspected near the date of contract termination in order to determine compliance. It is apparently the practice of the department to inspect a facility within 90 days of the expiration of a contract, to notify it of any deficiencies, and to obtain a plan of correction from the nursing home. After the lapse of some period to allow the nursing home an opportunity to correct the deficiencies, another inspection is held to determine whether corrective action has been completed. In view of this time-consuming process, the department will ordinarily be unable to comply with the one-year limitation if it must afford a hearing prior to the expiration of the contract, or even of the two-month extension permitted by federal law.

In the present case, for example, three inspections were conducted over a four-month period, one of them revealing 41 alleged deficiencies. A full-fledged airing and meaningful determination of such a multitude of charges could not be concluded within the time limitations set forth in the regulations.

The obvious purpose of the requirement that a contract with a nursing home be limited to one year is to assure that the facility meets state and federal requirements as a condition of continued participation in the Medi-Cal program. The cancellation of a contract during its term requires notice and hearing in accordance with section 11500 et seq. of the Government Code (Welf. & Inst. Code, § 14123), and the one-year limitation was designed to avoid the necessity of deferring the withdrawal of Medi-Cal funds from a facility which is in patent violation of the regulations until a full hearing can be held regarding the charges of noncompliance. Unquestionably, the limitation of contracts to one year provides a powerful incentive to a nursing home to assure that it continues to render adequate care to Medi-Cal recipients, in accordance with state and federal requirements.

Nor are we aware of any understandings between the department and Paramount that a provider agreement will be renewed as a matter of course. Amicus curiae, the California Association of Health Facilities, asserts that from 1968 until Paramount was refused a contract in 1972, the department automatically renewed provider agreements upon expiration, and that the present case represented the first instance of a refusal by the department to renew. However, the requirement that a new provider agreement be con-

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ditioned upon a determination of compliance with the regulations first appeared in section 51215 of the California regulations in 1972, the same year in which, according to amicus, the practice of automatic renewal ended.

Thus, the present case is distinguishable from *Perry v. Sindermann, supra,* 408 U.S. 593. Although *Perry* also involved a claim of entitlement based upon a one-year contract, there the regulations as well as the practices of the college indicated that the teachers enjoyed de facto tenure and there was an express representation that they would not be discharged without cause, demonstrated at a fair hearing consistent with the requirements of due process. In the present case, by contrast, the applicable regulations informed Paramount that the renewal of its contract depended upon a determination that it comply with certain regulations, and not only was there an absence of a promise of a due process hearing prior to nonrenewal, but pragmatically such a hearing could not occur before expiration of the contract term.

We conclude that Paramount's interest in the renewal of the provider contract amounted only to a hope or a unilateral expectation of renewal rather than to legal entitlement. But we do not intend to imply by this holding that the department may arbitrarily refuse to enter into a contract with a nursing home which meets the requirements of federal and state law. Rather, the effect of the provisions described above is to place upon a facility, as a condition of the renewal of its contract, the burden of demonstrating annually that it complies with the appropriate standards. If the department determines not to renew a

contract because of an alleged failure to conform to those requirements a nursing home may challenge the propriety of the refusal by the very means which Paramount employed in the present proceeding, i.e., by seeking a writ of mandate alleging compliance with the regulations, and an order to compel the department to enter into a contract. We do not perceive any constitutional impediment to imposing such a requirement upon a profit-making institution which desires to participate in a government-funded program.

But, argues Paramount, even if we should conclude that it is not legally entitled to a renewed contract, a hearing prior to nonrenewal must nevertheless be afforded to it on the independent ground that the failure to renew because of alleged noncompliance with the regulations amounts to a charge of incompetence, dishonesty, or immorality. In *Board of Regents v. Roth, supra,* 408 U.S. 564, the court stated that if the failure to rehire Roth had been accompanied by charges seriously damaging his standing in the community or his ability to obtain another job, he would be entitled to a hearing to refute the charges and clear his name. (See also *Zumwalt v. Trustees of Cal. State Colleges* (1973) 33 Cal.App.3d 665, 678-679 [109 Cal.Rptr. 344].)

Without being insensitive to the realities of the commercial world, we cannot agree that a determination by the department that a nursing facility has failed to meet its burden of showing that it complies with government regulations is the equivalent of a charge of incompetence or immorality. Even if that were true, however, there is a clear distinction between the circumstances of *Roth* and *Zumwalt* and the present case.

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A major reason why a teacher charged with misconduct or incompetence is entitled to a hearing to enable him to refute the charges against him is to avoid the possibility of damaging his prospects of employment at other schools. In the instant situation, the thrust of the hearing sought by a nursing home is not to enable the facility to clear its name so that it may attract patients outside the Medi-Cal program, but to participate in the program itself.[6] Thus, to a considerable degree, the rationale underlying the requirement for a hearing expressed in *Roth* is not germane where, as here, a nursing home seeks not moral vindication but renewal of a financially lucrative contract.

Paramount relies upon *Ross v. State of Wisconsin Dept. of Health & Social Serv.* (E.D. Wis. 1973) 369 F.Supp. 570 and *Coral Gables Convalescent Home, Inc. v. Richardson* (S.D.Fla. 1972) 340 F.Supp. 646, in support of its claim to a prior hearing. (But see *Shady Acres Nursing Home, Inc. v. Canary* (1973) 39 Ohio App.2d 47, (68 Ohio Ops.2d 210, 316 N.E.2d 481].)

In *Ross*, the court invalidated a Wisconsin statute providing for immediate removal from a nursing home of patients receiving public assistance, if the state determined that the facility did not comply with state standards and the health and safety of the patients was endangered. It was held that the nursing home had a property interest in retaining these patients since its claim of entitlement was defined by statute, and that the patients could not be removed without

[6]Paramount frankly admits that it is unable to function with private patients alone. According to amicus curiae, the California Association of Health Facilities, the overwhelming majority of nursing homes are in the same position.

notice and hearing except in a true emergency. *Coral Gables* held that a nursing home was entitled to a hearing to determine whether the government had acted properly in withholding Medicare funds because of alleged previous overpayments. Neither of these cases involved the failure to renew a provider contract upon its expiration, and their reasoning is therefore not persuasive in the present context.

We recognize that the refusal of the department to renew a provider agreement may seriously affect a nursing home's business. Nevertheless, this factor alone cannot be deemed decisive. For any vendor of goods or services to the state may be equally damaged if it has become dependent upon government purchases for a substantial portion of its income and the state chooses not to renew a purchasing contract. Yet no one would suggest that the vendor's dependence upon government purchases alone results in a legal entitlement to a new contract or that the vendor is entitled to a due process hearing as a condition of nonrenewal.

The Medi-Cal program was created for the benefit of those eligible to receive assistance under it, and not for the economic advantage of nursing homes which render services to the beneficiaries. This basic premise imposes upon us the duty to interpret the rules applicable to the program in a manner favorable to the beneficiaries unless constitutional prohibitions dictate otherwise. Our determination that a nursing home is obliged to demonstrate annually that it meets the standards for participation in the program and that it is not entitled to a hearing prior to nonrenewal of a provider contract is consistent both with due process

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of law and the promotion of the welfare of Medi-Cal patients, a vulnerable and exploited class of persons who are frequently powerless to vindicate their own rights.

The judgment is reversed.

Wright, C. J., McComb, J., Sullivan, J., Clark, J., and Richardson, J., concurred.

TOBRINER, J.—I dissent. The majority, in concluding that the State Department of Health need not afford a hearing to Paramount before declining to renew its Medi-Cal provider contract, embraces an unjustifiably restrictive conception of that property which the due process clause protects. The majority's opinion begins, as it should, with a reference to *Board of Regents v. Roth* (1972) 408 U.S. 564 [33 L.Ed.2d 548, 92 S.Ct. 2701]. *Roth* distinguished unilateral expectations, which fall without the ambit of the due process clause, from legitimate claims of entitlement, which command due process protection. Because I see no alternative to the conclusion that Paramount stands statutorily entitled to the renewal of its contract with the department so long as certain conditions are satisfied, I must dissent from the court's opinion.

The due process clause has long constituted a bulwark against arbitrary government infringement upon private property rights. In recent years, the realization that the common law concept of property proved ill-suited to an economy characterized by massive government intervention through contract and subsidy called for an expansion of the species of property protected by the due process clause. (See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues* (1965)

74 Yale L.J. 1245.) The United States Supreme Court lent judicial imprimatur to this expanded notion of property in *Goldberg v. Kelly* (1970) 397 U.S. 254 [25 L.Ed.2d 287, 90 S.Ct. 1011], when it required New York to provide welfare recipients a hearing prior to the termination of their welfare benefits.

Perry v. Sindermann (1972) 408 U.S. 593 [33 L.Ed.2d 570, 92 S.Ct. 2964], a companion case of *Roth*, later indicated that property interests short of formal contractual agreements or explicit statutory guarantees could implicate the due process clause. In *Perry*, the court required a college to provide a hearing to a non-tenured teacher before refusing to renew his one-year contract. The practices and regulations of the college, the court concluded, secured a legitimate claim of entitlement to continued employment, the absence of a contractual guarantee notwithstanding.

Paramount stands entitled to a hearing as certainly as the welfare recipients in *Goldberg* and more so than the teacher in *Perry*. Like the plaintiffs in *Goldberg*, Paramount roots its claim of entitlement in explicit statutory language. The regulations governing Medi-Cal speak in mandatory terms: any nursing home that complies with the regulations may participate in the program (Cal. Admin. Code, tit. 22, § 51451) and the department "shall" enter into a contract with every qualified nursing home. (§ 51215.) These mandatory provisions confer upon Paramount a statutory right to participate in the program, subject only to its compliance with the apposite regulations. The clear import of *Goldberg*, then, is that the department cannot exclude it from the program without offering it an opportunity to demonstrate its compliance with those regulations.

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The majority concedes that "[a]t first blush these mandatory provisions lend encouragement to Paramount." (Majority opn., *ante*, at p. A-8.) For two reasons, however, it concludes that these regulations confer no property right upon Paramount. Paramount's position does not pale so rapidly in the face of these arguments as the majority would have it.

The majority submits first that Paramount, unlike the plaintiffs in *Perry* and *Goldberg*, is not the intended beneficiary of the statutory entitlement. Medi-Cal, the argument goes, is intended to protect the patients, not enrich the nursing homes. Consequently, the program bestows no claim of entitlement upon any nursing home. Although the factual premise of the argument is no doubt correct, it hardly casts Paramount's interest in the renewal of its contract beyond the purview of the due process clause. Three conceptual hurdles stand between that premise and the conclusion the majority culls from it.

First, the majority should have crafted its inquiry into statutory intent more narrowly. The Medi-Cal program surely sprang from a concern about patients, not nursing homes. The possibility remains, however, that the mandatory language in the specific sections that give rise to Paramount's claim of entitlement emanates from a legislative purpose to allocate the incidental benefits to nursing homes in an equitable manner. The majority makes little attempt to divine the purposes that actuated these specific sections, but largely contents itself with a recital of the purposes of Medi-Cal as a whole. While the majority does note that these regulations effectuate the goal of Medi-Cal that patients have as wide a choice of nursing

homes as possible, it simply assumes that that was the sole motive behind the mandatory provisions. I am not so prepared summarily to dismiss the possibility that the Legislature intended to curtail caprice in the distribution of government bounty.

Second, the department should afford Paramount a hearing even if the due process clause is concerned exclusively with effecting statutory intent and the statute's sole purpose is to protect nursing home patients. The court acknowledges that Medi-Cal endeavors to enhance the welfare of patients by providing a wide choice of nursing homes. An arbitrary refusal to contract with a qualified home subverts that legislative design. The most straightforward way to protect the freedom of choice of the patients is to recognize the right of the home to establish its compliance with the relevant regulations at a fair hearing.[1]

Third, and most fundamentally, the court's argument misconceives the doctrinal posture of the due process clause. That clause does not serve merely as a judicial vehicle for effecting legislative intent. Its role is more general and more basic: it strives to curtail arbitrary government deprivation of rights in life, liberty, and property.[2] Consequently, the sole inquiry becomes

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[1]The nursing home clearly has a more compelling interest in promptly and persuasively defending its right to contract renewal than any of its residents. Moreover, only the nursing home can effectively protect the interests of future nursing home residents who might opt for this particular nursing home.

[2]See, e.g., *Fuentes v. Shevin* (1972) 407 U.S. 67 [32 L.Ed. 2d 556, 92 S.Ct. 1983] (goods bought under conditional sales contracts); *Goldberg v. Kelly, supra* (welfare benefits); *Armstrong v. Manzo* (1965) 380 U.S. 545 [14 L.Ed.2d 62, 85 S.Ct. 1187] (child custody); *Greene v. McElroy* (1959) 360 U.S. 474 [3 L.Ed.2d 1377, 79 S.Ct. 1400] (employment).

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whether Paramount possesses a property right in the renewal of its provider contract. This much the majority acknowledges. *Roth* tells us that legitimate claims of entitlement are protected property interests. The inevitable conclusion is that Paramount has a right to a hearing if it is "entitled" to the renewal of its contract. The majority does not deny that Paramount is so entitled; indeed, it confesses that "a nursing home *is entitled* to participate in the Medi-Cal program if it meets the standards set forth in . . . that title." (Majority opn., *ante*, at p. A-7, italics added.) Rather, the majority imposes the additional requirement —neither contemplated by the federal cases nor reconcilable with them—that the entitlement arises from a program designed to benefit the party asserting it.

It is not surprising that the majority finds no language in *Goldberg*, *Roth*, or *Perry* to support its novel proposition.[3] The due process clause protects all property; the fact that the property arose from a government program designed primarily to benefit someone else is, perforce, inconsequential. The only conceivable basis for the majority's opinion would be the untenable theory that some entitlements are not property. *Roth* surely put that hypothesis to rest. (408 U.S. 564 577 [33 L.Ed.2d 548, 560-561]; see also *Goldberg v. Kelly*, *supra*, 397 U.S. at p. 262, fn. 8 [25 L.Ed.2d at pp. 295-296].) The passage from *Roth* quoted

[3]It is not even clear that *Perry* would have come out as it did had the majority's test been applied. In part, the court based the finding of a de facto tenure system on the common practice of rehiring teachers. The rehiring of teachers as a matter of course may have reflected nothing more than administrative convenience; consequently, it is questionable whether the teacher in *Perry* was an intended beneficiary of that practice.

by the majority renders transparent the weakness of such a theory: "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." (408 U.S. 564, 577 [33 L.Ed.2d 548, 561].) *Roth* bottomed its conclusion that legitimate claims of entitlement merit due process protection squarely on notions of reliance—not of effecting statutory goals. Considerations of fairness and the realities of the marketplace both impel the conclusion that nursing homes rely upon the government's compliance with regulations that have impact upon those homes, even if the regulations are designed to benefit third parties.

I frankly doubt that this court would be willing to follow the majority to the point where the principle it espouses might lead it. For example, it is not at all inconceivable that some welfare programs spring primarily from a concern for the well-being of persons other than the welfare recipients: the potential victims of those whom poverty forces to crime, the children of impoverished parents, and the ordinary citizen who—revulsed by the manifestations of poverty—would rather eradicate it than face it. If welfare programs devolved primarily from such non-egalitarian motives, the court's paradigm would leave helpless an individual whom the government arbitrarily refused to aid. I find it difficult to believe, however, that the court would have the judiciary ignore blatant refusals to aid those who satisfy the eligibility criteria. Since the relevant statute confers them with a legitimate claim of entitle-

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ment, they must be accorded a hearing. Paramount deserves no less.

The majority proffers a second reasoning for denying Paramount's statutory claim of entitlement to due process protection. It insists that requiring a hearing prior to refusing to renew a provider contract would preclude compliance with the statutory requirements that contracts be limited to one year and that no new contract be executed before a nursing home complies with the regulations. This argument is misdirected. Although the pragmatic difficulties that would attend granting Paramount a hearing properly bear upon the form and timing of that hearing, they are of no consequence in the threshold determination whether *some* form of due process hearing is required. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 470-571, fns. 7, 8 [33 L.Ed.2d 548, 556-557, 92 S.Ct. 2701].) At most, the majority's argument justifies carefully contouring the required hearing to permit satisfaction of the federal regulations.

Neither of the arguments the majority adduces suffices to cast Paramount's entitlement beyond the pale of due process. Consequently, it stands entitled to some form of hearing in connection with the department's refusal to renew its provider contract. The majority's contrary conclusion conflicts with the pronouncement of a lower federal court. In *Ross v. State of Wisconsin Dept. of Health & Social Serv.* (E.D.Wis. 1973) 369 F.Supp. 570, the court invalidated a statute providing for the immediate removal from a nursing home of patients receiving public assistance upon a determination that the home's failure to comply with certain standards endangered the health and safety

of the patients. The court reasoned that the nursing home had, by virtue of statutory entitlement, a property interest in retaining these patients of which it could not be divested without notice and hearing absent a true emergency. Although *Ross* did not not deal with the renewal of provider contracts, it nonetheless applies to the present case since it recognizes a property interest in the nursing home in retaining public assistance patients according to the terms of the relevant statute.[4]

While the Fourteenth Amendment posits the right to due process in unequivocal terms, it leaves less clear precisely how much process is due. In most cases, the due process clause guarantees a hearing prior to a final deprivation of property. (*Goss v. Lopez* (1975) 419 U.S. 565, 579 [42 L.Ed.2d 725, 737, 95 S.Ct. ....]; *Board of Regents v. Roth* (1972) 408 U.S. 564, 570, fn. 7 [33 L.Ed.2d 548, 556, 92 S.Ct. 2701]; *Goldberg v. Kelly* (1970) 397 U.S. 254 [25 L.Ed.2d 287, 90 S.Ct. 1011].) Sufficiently exigent circumstances, however, can justify the provision of only an after-the-fact hearing. (*Board of Regents v. Roth, supra,* 408 U.S. 564, 570, fn. 7; *Boddie v. Connecticut* (1971) 401 U.S. 371, 377 [28 L.Ed. 2d 113, 118, 91 S.Ct. 780].) It remains to inquire, then, whether the circumstances of this case justify the provision of a hearing only after the refusal to renew the contract.

The majority opines that it would be impossible for the department to inspect nursing home facilities late enough to be assured that the home complied

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[4]*Shady Acres Nursing Home, Inc. v. Canary* (1973) 39 Ohio App.2d 47 [68 Ohio Ops.2d 210, 316 N.E.2d 481],

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with the germane regulations at the time the new contract was executed and early enough to permit the conduct of a hearing before the old contract expired. The majority, I think, overplays the difficulty of accommodating compliance with the federal regulations and provision of the pretermination hearing. The department currently inspects nursing homes within 90 days of the expiration of the extant provider contract. In the period between the initial inspection and the contract's expiration, the department receives from the home a plan to correct any deficiencies, gives the home time to effect the corrections, and inspects the facility again to ensure the corrections have been completed. I see no reason why the department could not commence this process 100 days, rather than 90 days, before the contract expires or expedite each of the steps in the process by a few days.[5] By either process the department will have ample time prior to the expiration of old contract to conduct the requisite hearing.[6] Moreover, the federal regulations permit two-month extensions of the provider contracts where necessary to prevent irreparable harm to facilities. (45 C.F.R. § 249.33(a)(6).) The accommodation of a pre-expira-

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cited by the majority at page A-13, *ante*, arrives at a contrary conclusion, but does not discuss *Roth*, *Perry*, or *Goldberg*. Its persuasive value, therefore, is limited.

[5]In the present action the department apparently had time to go through the entire process twice.

[6]Before-the-fact hearings need not feature all the procedural embellishments of their after-the-fact counterparts. *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786 [36 L.Ed.2d 656, 664, 93 S.Ct. 1756]; *Goldberg v. Kelly, supra*, 397 U.S. 254, 270 [25 L.Ed.2d 287, 300].) Consequently, they should not consume inordinate time. Nor should the parties require much time to prepare for them. The entire inspection-correction-reinspection process is, in effect, preparation for the hearing.

tion hearing with the federal regulations should not, therefore, prove intractable.

A more plausible warrant for affording only a post-expiration hearing stems from a concern for a patient residing in a substandard facility. If the purported violations constituted a grave and immediate danger to the welfare of patients, the state might be justified in providing only a post-expiration hearing. The instant matter, however, does not present such a case. In the absence of a true emergency, Paramount should be heard before the expiration of its provider contract. (*Ross v. State of Wisconsin Dept. of Health & Social Serv., supra,* 369 F.Supp. 570, 572.) This conclusion draws further support from the singular impact of a refusal to renew the provider contract upon Paramount's operations.[7] (*Goldberg v. Kelly, supra,* 397 U.S. 254.)

In sum, I conclude that the mandatory language of the Medi-Cal regulations invests Paramount with a property interest of which it cannot be deprived without due process of law. I find that Paramount deserves a hearing prior to the expiration of its provider contract.

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[7]As Paramount notes, it cannot continue to operate without a provider contract. Consequently, the refusal to renew the provider contract emasculates the value of Paramount's license. Yet the state could not strip Paramount of its license without a prior hearing. It seems questionable to allow the state to effect the same result through the medium of not renewing the provider contract.

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APPENDIX B.

Order.

(Filed March 26, 1973).

Superior Court of California, County of Los Angeles, Dept. 85.

Honorable David A. Thomas, C. Saunders, Deputy Clerk.

Paramount Convalescent Center, Inc., etc. vs. Department of Health Care Services, Department of Public Health and Department of Public Social Services. C 46611.

NATURE OF PROCEEDINGS.

Return to Alternative Writ of Mandate.

In this matter, heretofore taken under submission on February 26, 1973 the court now makes the following ruling:

The court finds that the petitioner's provider contract was not renewed for reason of those deficiencies in the petitioner's service (herein "deficiencies") which respondent maintains did exist and which petitioner denies did exist.

There is both, appeal and some logic to respondent's argument that no hearing on the issue of the deficiencies need be held because the contract was not terminated for said deficiencies but simply allowed to expire by its terms and that respondent now merely declines to enter another contract with petitioner. For present purposes, at least, the court accepts the propositions that a rejected new applicant for a provider contract is not entitled to a hearing nor is one whose contract has been allowed to expire without renewal for a reason not personal to the provider (e.g. surplus of care-homes, lack of funds, etc.). But, as found above,

this instant situation is different and the court concludes that in this situation the petitioner is entitled to a hearing to the extent ordered below.

The authorities submitted by the parties and those read by the court in its own research are not particularly helpful in that factually they are easily distinguishable (as both counsel orally conceded of their own authorities). The court concludes that the issue really gets down to the bedrock of due process. While petitioner does not have a "property right" in a contination or renewal of the provider contract, of course, his interest is being substantially affected by this action (or lack thereof) by the respondent. Without the provider contract, on which petitioner obviously has relied and needs in order to operate his premises, his investment is substantially injured. Niceties of defining whether petitioner's interest is a "property right" should not dim the clear conclusion that he is being substantially injured by the respondent's action for which except for a hearing he has no redress. See *Scott v. City of Indian Wells* (1972) 6 C.3d 541 at 549.

A hearing should take place within the next 30 days after issuance of a peremptory writ at which the alleged deficiencies will be determined.

Peremptory Writ of Mandate to issue as set out above. Alternative Writ discharged.

The petitioner will prepare, serve on opposing counsel and submit the judgment and peremptory writ and serve notice.

If findings of fact and conclusions of law are requested in accordance with Rule 232, California Rules of Court, the petitioner will prepare, serve on opposing counsel and submit same to the court.

Copy of this order is mailed to all counsel.

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APPENDIX C.

Provisions of Law Involved.

Fourteenth Amendment to United States Constitution

". . . [N]o state shall . . . deprive any person of life, liberty or property, without due process of law. . . ."

42 U.S.C. § 1396a

"(a) A State plan for medical assistance must—

". . .

"(3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness;

". . .

42 U.S.C. § 1396c

"If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds—

. . .

(2) that in the administration of the plan there is a failure to comply substantially with any provision;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to

such State (or shall limit payments to categories under or parts of the State plan not affected by such failure)."

45 C.F.R. § 249.33

"(a) *State plan requirements.* A State plan for medical assistance under Title XIX of the Social Security Act must:

". . .

"(6) Provide that execution of the single State agency provider agreement with a facility for payments under the plan shall be contingent upon certification in accordance with the provisions of paragraph (a)(1) and (2) of this section. The term of an agreement may not exceed a period of one year and the effective date of such agreement may not be earlier than the date of certification. Execution of a provider agreement shall be for the term and in accordance with the provisions of certification determined by the survey agency except that the single State agency for good cause based on adequate and documented evidence may elect to execute a provider agreement for a term less than the full period of certification or may elect not to execute a provider agreement or may cancel a provider agreement for participation by a facility certified under the State plan. . . .

". . ."

22 California Administrative Code § 51215

"(a) A nursing home shall be licensed by the California State Department of Public Health . . . or be exempt under State law from licensure; and meet

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all of the standards set forth herein or be certified as a participating provider of extended care facility services under Title XVIII of the Social Security Act and meet the standards set forth in paragraphs (1), (2), (10), (11) and (12) of this subsection.

". . .

"(12) Enter into a participation agreement with the Department of Health Care Services that the facility is in compliance with the provisions of this section. The participation agreement with the Department shall remain in effect no longer than the period of certification established under (a)(12)(B) of this Section or one year whichever is less. New agreements shall be authorized only upon determination by the Department that the nursing home continues to meet the standards set forth in this Section.

". . .

"(B) A nursing home shall be certified to participate in the Medi-Cal program when it is determined that the nursing home meets the standards of participation as set forth in this Section. . . .

"1. If the nursing home is determined to be in substantial compliance (i.e., is in compliance except for specific regulatory deficiencies) with the standards for participation set forth in this Section. the nursing home may be certified for a period not to exceed six months provided that on the basis of documented evidence derived from an inspection it is determined by the Department that there is a reasonable prospect that the

deficiencies can be corrected within six months and the nursing home provides, in writing, a plan acceptable to the Department for so doing; and the deficiencies noted individually or in combination do not jeopardize the health and safety of the patients."

". . ."

22 California Administrative Code § 51451

"All individuals . . . corporations or institutions meeting the requirements specified in the Definitions (Article 2 of Chapter 3 of these Regulations) and Standards for Participation (Article 3 of Chapter 3 of these Regulations) may participate in the California Medical Assistance Program except:

"(a) Where such individuals . . . corporations or institutions, on or before March 1, 1966, were suspended from eligibility to receive payments under the Public Assistance Medical Care Program or the Medical Assistance for the Aged program. Such suspension shall not preclude petition for reinstatement under the provisions of these regulations and Government Code Section 11522.

"(b) Where such individuals . . . corporations or institutions have been suspended or decertified by written order of the Director."

22 California Administrative Code § 51452

"Violation of any rule or regulation relating to the provision of health care services under the California Medical Assistance Program by any individual . . . corporation . . . or any officer, director, agent, or employee, shall be deemed contrary to public health, safety, welfare, and morals, and to said program and grounds for suspension from participation in said program.

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22 California Administrative Code § 51453

"The Director may commence proceedings under Chapter 5 (commencing with Section 11500) . . . of the Government Code leading to the suspension of any individual [or] . . . corporation . . . from participation in the California Medical Assistance Program. . . ."

California Welfare and Institutions Code § 14123

"Participation in the medical assistance program by a provider of service is subject to suspension in order to protect the health of the recipients and the funds appropriated to carry out this chapter.

"(a) The director may suspend a provider of service from further participation under the medical assistance program for violation of the provisions of this chapter or any rule or regulation promulgated by the director pursuant to this chapter. . . .

"(b) The proceedings for suspension shall be conducted in accordance with Chapter 5 (commencing with Section 11500) . . . of the Government Code. . . .

". . ."

California Government Code § 11501

"(a) The procedure of any agency shall be conducted pursuant to the provisions of this chapter. . . .

"(b) The enumerated agencies referred to in Section 11500 are:

". . .

"State Department of Public Health [now the State Department of Health]

". . ."

California Government Code § 11503

"A hearing to determine whether a right . . . or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules.
". . ."

California Government Code § 11504

"A hearing to determine whether a right . . . or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing, and in addition any particular matters which have come to the attention of the initiating party and which would authorize the denial of the agency action sought. . . ."

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1333

PARAMOUNT CONVALESCENT CENTER, INC.,
Petitioner,

vs.

DEPARTMENT OF HEALTH CARE SERVICES, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

EVELLE J. YOUNGER,
Attorney General,
N. EUGENE HILL,
Assistant Attorney General,
RONALD V. THUNEN, JR.,
JAMES E. RYAN,
Deputy Attorneys General,
800 Tishman Building,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
Attorneys for Respondents.

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1333

PARAMOUNT CONVALESCENT CENTER, INC.,
Petitioner,

vs.

DEPARTMENT OF HEALTH CARE SERVICES, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Opinion Below

The opinion of the Supreme Court of the State of California is reported at 15 Cal. 3d 489 and appears in petitioner's brief as Appendix A.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Where as a result of several health inspections a skilled nursing facility has demonstrated a continual inability to comply with applicable regulations, and, as a result thereof, the State Department of Health has refused to enter into a new agreement with the facility entitling the latter to participate in the Medi-

Cal Program, must the state afford the facility a hearing before its decision may be effective?

Provisions of Law Involved

The provisions of law involved are set forth in Appendix A hereto in the order in which they appear in the text.

Statement of the Case

Facts

Throughout the period under discussion, petitioner was the owner of a skilled nursing facility licensed by the California State Department of Health.[1] Certain of the patients cared for at petitioner's facility were eligible beneficiaries of the state's Medicaid program.[2] In order for the facility to participate in said program as a provider of medical services and thus to receive payment therefor, federal[3] and state[4] regulations require that there be executed and be in effect a provider participation agreement between the facility and the responsible single State Agency.[5]

Petitioner had been a certified Medi-Cal provider since 1968. The first participation agreement of relevance was executed on June 14, 1972 and was stipulated to expire on July 31, 1972. On July 20-21, 1972 the respondent conducted an inspection of petitioner's facility and found twenty deficiencies. A letter

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[1]California Health and Safety Code section 1250 *et seq.*

[2]In California said program is denominated "Medi-Cal," see Welfare and Institutions Code section 14000 *et seq.*

[3]45 C.F.R. § 250.21.

[4]Title 22 California Administrative Code § 51215.

[5]Formerly the Department of Health Care Services, now the State Department of Health, which is referred to herein as respondent.

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explaining the deficiencies was sent to petitioner on July 27, 1972, which included a request that petitioner prepare and forward a plan for correction of these deficiencies. The acts complained of included incomplete and incorrect nursing notes and patient chart entries, failure to give patients medication as ordered by physicians, water temperature at tub and other patients' fixtures at a dangerous high of 160 degrees Fahrenheit, failure to provide patients with clean towels, and inadequate nursing care.

On August 10, 1972 respondent by letter again requested that petitioner submit a plan of correction as to the July inspection. In the interim, a new participation agreement had been executed extending coverage through October 31, 1972.

A second inspection of petitioner's facility was performed on September 20-21, 1972 wherein forty-one deficiencies were revealed. The deficiencies found during this inspection were set forth in a letter to petitioner from the respondent on October 12, 1972. The violations included incomplete and inadequate nursing notes and patient chart entries, inadequate nursing staff, lack of a supervising registered nurse, the assignment of a nurse's aide to sterilize patients' bedside equipment who did not know how to operate the sterilizer, and improper patient care. A plan of correction was again requested, and petitioner prepared and forwarded one on October 23, 1972.

This response was considered unsatisfactory and, consequently, respondent in a letter dated November 15, 1972, informed petitioner that due to the number and continuing nature of deficiencies at the facility a new participation agreement would not be executed. In order

to assure an orderly transfer of Medi-Cal patients from the facility, however, thirty-day and twenty-one-day extensions to the agreement were granted. The last date upon which any contract between the parties was in effect was December 21, 1972.

When informed of respondent's intended action petitioner insisted that it was in full compliance with Medi-Cal regulations. Petitioner then conducted a third inspection on November 22, 1972. On this visit there were still twenty deficiencies noted, among them: Incorrect charting of patient records, failure to follow physicians' orders, nonfunctioning sterilizing equipment, patients being maintained under unsanitary conditions, incontinent patients not receiving proper care, and a general failure to meet minimum standards of care.

Respondent notified petitioner the next day of its findings and a meeting was held that same day to discuss these latest deficiencies. This conference was unproductive and thereafter respondent refused to enter into a new provider participation agreement with petitioner once the last agreement had run its course.

Proceedings Below

In December 1972 petitioner brought a mandamus action in Los Angeles Superior Court. That court issued its writ directing the respondent to provide petitioner an administrative hearing on the issues before taking any action on its decision not to enter into a new participation agreement with the facility. That ruling was upheld by a divided panel of the California Court of Appeal.

The Supreme Court of California in a 6-1 decision reversed the lower court judgment holding, *inter alia,*

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that petitioner had no legal entitlement to a hearing prior to respondent taking action on its decision not to enter into a new provider participation agreement; that the thrust of federal and state law is to assure that Medi-Cal beneficiaries receive care in those skilled nursing facilities which have demonstrated an ability to meet applicable standards and that if any entitlement is created under the law, it is the Medi-Cal recipients who are the beneficiaries thereof and not the skilled nursing facilities; that to require respondent to grant provider hearings prior to its refusal to enter into new agreements would place the respondent in jeopardy of violating its own regulations and those of the federal government, which require that participation agreements be limited to a period of one year, and thus run the risk of losing millions of dollars in federal grants; that, at most, petitioner merely had a hope or unilateral expectancy in having a new participation agreement executed by respondent.

ARGUMENT

Opening Statement

At the outset it must be emphasized that this case does *not* involve a situation wherein the state without affording a prior hearing has suspended or revoked a license, or has rescinded or otherwise terminated an executory contract. Very simply stated, what *is* involved here is a decision by the state, based upon a history of continuing noncompliances with applicable regulations, to refuse to continue to pay Medi-Cal funds to a deficient facility. That decision was effectuated by the respondent's refusal to enter into a new Medi-Cal participation agreement with petitioner once the last agreement between the parties had expired by its own terms.

Petitioner asserts that it is entitled to an evidentiary hearing prior to the state's decision taking effect. Respondent urges, as was held by the Supreme Court of California, that not only is petitioner not entitled to such a hearing but that to grant such a hearing would place respondent in violation of its own and federal law.

This due process issue is unique to the Medicaid program and, as such, presents an extremely narrow range of application. Furthermore, respondent's action was consistent with previous decisions of this Court on the issue of when preliminary due process hearings may be required. Consequently, respondent submits that review by this Court does not appear warranted.

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A. The Opinion Below Does Not Conflict With Prior Decisions of This Court

In an effort to persuade this Court to grant review in this case, petitioner asserts that the opinion below conflicts with prior decisions of this Court concerning the Fourteenth Amendment's protection of liberty and property. In particular, petitioner alleges that there has been a secession from the teachings of *Board of Regents v. Roth*, 408 U.S. 564 (1972).

An examination of the principles enunciated in that case demonstrates that petitioner herein presents no different a situation than that which was before the Court in *Roth, supra.*

The initial inquiry to be made in any case in which the petitioner claims an entitlement to a due process hearing is an appraisal of the nature of the interest at stake. (408 U.S. at p. 571.) Once that interest has been identified it must next be evaluated in order to determine whether it comes within the elevated and constitutionally protected genre of "property" interests. The Court in *Roth, supra,* characterized "property" interests as follows:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." (408 U.S. at p. 577.)

Petitioner in this action claims it possesses such an entitlement. The legitimacy of that claim must spring from and be tested against its purported origin:

> "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . ." (408 U.S. at p. 577.)

Petitioner's claim of entitlement, therefore, must arise from the agreements between the parties and applicable federal and state laws and regulations. The Medi-Cal provider participation agreements between the parties merely set forth the respective duties thereunder of the parties and are silent with respect to whether or under what conditions future agreements will be executed. Consequently, the examination of legitimacy must be directed to the governing regulations in order to measure and define the expectation of petitioner with respect to the execution of future participation agreements.

Pursuant to agreement and statute the administration of the Medi-Cal program has been preempted by the federal government. 42 U.S.C. § 1396; Welf. & Inst. Code §§ 14003, 14020, 14100.1; 22 Cal. Admin. Code § 50009; *King* v. *Smith*, 392 U.S. 309 (1968); *County of Alameda v. Carleson*, 5 Cal. 3d 730 (1971). Accordingly the program must be administered in strict accordance with federal statutes and regulations.

Federal regulations provide that federal funding of the Medi-Cal program is available *only* where there is an agreement between the state agency and the provider. 45 Code of Federal Regulations section 250.21 provides:

> "A State plan for medical assistance under Title XIX of the Social Security Act must provide

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> for agreements with every person or institution providing services under the State plan. . . ."

State Medi-Cal regulations also contained this requirement. Title 22 Cal. Admin. Code § 51215(a)(12).[6]

Federal regulations further provide that the term of any such agreement shall not exceed the period of one year. 45 C.F.R. § 249.33(a)(6). (*Accord*, Title 22 Cal. Admin. Code, former § 51215(a)(12).)

Federal and state regulations also require that no initial provider agreement or new agreement upon expiration of a prior agreement may be executed unless the state agency determines that the facility is in compliance with each condition of participation in the Medi-Cal program.[7] Those same regulations do provide for the extension of an agreement for up to 60 days but only where it is determined that the health and safety of the patients will not be jeopardized thereby and that such extension is necessary to prevent irreparable harm to such facility or hardship to the individuals being furnished items or services, or that it is impracticable within such provider agreement period to determine whether such facility is complying with the provisions and requirements under the program. 45 C.F.R. § 249.33(a)(6).

These were the governing regulations which were in effect when petitioner executed the participation agreements in 1972 and during the period when the aforementioned inspections were being conducted and

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[6]§ 51215 has since been amended and the provided participation agreement requirement now appears at subsection (a)(3) thereof. The text of § 51215(a)(12) as it read during the period of time relevant to this action appears in App. A hereto.

[7]45 C.F.R. § 249.33(a)(4)(i); Title 22 Cal. Admin. Code, former § 51215(a)(12).

petitioner was being warned that it was not in compliance and that it was in danger of losing its Medi-Cal provider status.

It is clear from these regulations that a provider could not possibly anticipate automatic renewals of participation agreements since there was a continuing duty on the part of the provider to demonstrate compliance and a continuing mandate to the respondent that it could not execute an agreement until it had satisfied itself as to the facility's compliance. Moreover, if the state agency should violate this mandate, it subjects itself to the loss of federal funds for the Medi-Cal program. 45 C.F.R. § 249.10(b)(4)(i)(c).

Petitioner, however, argues that respondent had historically entered into new agreements upon the expiration of previous contracts and that this practice created a *de facto* policy whereby petitioner held a protectible expectancy. (*See, Perry v. Sindermann,* 408 U.S. 593 (1972).) First of all, there is nothing in the record pertaining to what had been the policy and practice of respondent with respect to what it would do upon the expiration of a participation agreement.

Secondly, petitioner at bar, unlike the respondent in *Perry, supra,* has made no showing of any "common law" resulting from Medi-Cal policies or practices which would raise petitioner's interest from that of a hope to the equivalent of a "property" interest. The teacher in *Perry, supra,* on the other hand, was able to demonstrate through testimony and demonstrative evidence (such as a provision in the Faculty Guide) that there in fact had been reasonable reliance upon expressions by the employing school that, in effect, a teacher would continue to be hired unless dismissed for cause.

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Whereas the commitment of the school in *Perry* was in the nature of a condition subsequent, *i.e.*, that a teacher would remain employed *until* cause for dismissal arose, the situation at bar involves a condition precedent. In other words, a new agreement will not be executed until the provider *first* satisfies all of the conditions of participation.

Thirdly, even had there been a state practice of automatic contract renewal, such a policy could not obviate the requirements and mandate of the regulations cited above. Otherwise, a situation would be presented whereby a provider, notwithstanding his knowledge of regulations to the contrary, could claim a "property" interest which arose from violations of federal and state law.

From the above there can be little question that the petitioner's status is no different than that of the college professor in *Board of Regents v. Roth, supra,* at 578:

> "Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment."

Petitioner takes issue with the California Supreme Court's adherence to the *Roth* rationale and its dif-

ferentiation of the *Perry* decision because, petitioner alleges (Petition p. 16), the court overlooked the fact that the regulation (22 Cal. Admin. Code § 51215), which requires respondent to assure compliance before executing an agreement with the facility was not promulgated until 1972; the inference being that respondent, therefore, may have practiced a policy of entering into new agreements *without* requiring such a showing. It would appear, however, that petitioner is the one who suffers from myopia since *federal* regulations have required the responsible state agency to make such a determination of compliance since at least 1970. (*See*, the text of former 45 C.F.R. § 249.33(a)(2)(i) as set forth in 35 Fed. Reg. 6792 (1970).)

Petitioner also complains that the opinion below adds a new element to the *Roth* decision in that the court held that a petitioner must be the chief beneficiary of the statute under attack in order to claim due process rights thereunder. This characterization of the court's holding is erroneous. The court's discussion on this subject arose only in the context of its response to the contention that the decisions in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Perry v. Sindermann, supra, compelled* a holding that petitioner at bar is entitled to a due process hearing.

For this reason, the opinion below is not in conflict with the *Roth* case.[8] In fact, the California Supreme

[8]Petitioner also asserts that the same alleged conflict exists with respect to *Ross v. State of Wisconsin Dept. of Health & Social Serv.*, 369 F. Supp. 570 (E.D. Wisc. 1973). Respondent is unaware of any rule which holds that a conflict between a state supreme court decision and that of a federal district court is a sufficient basis for granting certiorari by this Court. Furthermore, the *Ross* case is distinguishable from the case at bar on several fronts, not the least of which is the fact that there is no indication that *Ross* involved a Medicaid program.

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Court succinctly stated the basis for its decision:

> "We conclude that Paramount's interest in the renewal of the provider contract amounted only to a hope or a unilateral expectation of renewal rather than to legal entitlement." (Petition, App. at A-11.)

The Supreme Court of California also recognized that if respondent were required to accord a hearing prior to its refusal to enter into a new agreement, it would be impossible in most instances to simultaneously abide by the one-year requirement of 45 Code of Federal Regulations section 249.33(a)(6) and 22 California Administrative Code section 51215. Petitioner attempts to ameliorate this both legitimate and practical consideration by suggesting (Petition pp. 11-12), that the court overlooked the possibility of a 60-day extension of the agreement pursuant to 45 Code of Federal Regulations section 249.33(a)(6), thus affording respondent additional time within which to conduct such a hearing.

Such a suggestion, however, completely ignores the condition precedent to such an extension, *i.e.*, "that the health and safety of the patients will not be jeopardized thereby." A mere cursory review of the deficiencies found at petitioner's facility during the three inspections between September and November 1972 clearly demonstrates that the health and safety of the patients therein were in imminent and continuing danger. Furthermore, 22 California Administrative Code section 51452 provides:

> "Violation of any rule or regulation relating to the provision of health care services under the California Medical Assistance Program . . .

shall be deemed contrary to public health, safety, welfare, and morals. . . ."

It is clear, therefore, that petitioner's interest in having a new provider participation agreement executed was not in the nature of a "property" interest and that the opinion below is entirely consistent, rather than in conflict, with previous decisions of this Court.

B. The California Supreme Court Has Not Decided an Important Question of Law Which Has Not Been Settled by This Court

Petitioner's second major argument as to why this Court should grant certiorari is based upon the premise that the California Supreme Court, in holding that a Medi-Cal provider is not entitled to a hearing prior to being terminated from the program, has decided an important question of federal law which has not been settled by this Court. Respondent offers that the discussion above resolves this purported ground for review.

In the first place, petitioner was never "terminated" from the Medi-Cal program. The respondent merely refused to contract with petitioner for the use of its services as a provider of medical treatment and care to Medi-Cal recipients.

Secondly, respondent submits that since the case at bar presents issues so closely analogous to those treated in the *Board of Regents v. Roth* case, *supra,* and since the holding below is wholly consistent with that decision, the important question of law, if there be one, by virtue of the *Roth* decision has *already* been decided by this Court.

Petitioner attempts to avert the *stare decisis* effect of the *Roth* case by alleging that the present case

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comes within the exception mentioned in *Roth* to the effect that a due process hearing may be required "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." (408 U.S. at p. 573.)

Respondent will defer to the California Supreme Court's treatment of this argument:

> ". . . [W]e cannot agree that a determination by the department that a nursing facility has failed to meet its burden of showing that it complies with government regulations is the equivalent of a charge of incompetence or immorality. Even if that were true, however, there is a clear distinction between the circumstances of *Roth* and *Zumwalt* and the present case. A major reason why a teacher charged with misconduct or incompetence is entitled to a hearing to enable him to refute the charges against him is to avoid the possibility of damaging his prospects of employment at other schools. In the instant situation, the thrust of the hearing sought by a nursing home is not to enable the facility to clear its name so that it may attract patients outside the Medi-Cal program, but to participate in the program itself." (Petition, App. at A-12, 13.)

The court did not discuss alternatives available to petitioner, such as reapplying for Medi-Cal certification upon correction of the deficiencies, or conversion of the facility to another type of health facility.

Also, those cases[9] in which this Court has mandated a due process hearing involve situations which, when

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[9]*Goss v. Lopez*, 419 U.S. 565 (1975) [suspension of students from school for misconduct]; *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) [publishing notices in liquor stores that respondent was not to be sold alcoholic beverages].

contrasted with a refusal to contract, are polar in terms of the nature of the action taken against the individual and its obvious stigmatic effect upon the claimant's reputation and future.

It should also be noted that in each of those cases, and in *Perry v. Sindermann, supra,* there were no procedural safeguards whereby the aggrieved party might have an opportunity to refute the charges against him and thereby clear his name before the proposed action took place.[10] Here, however, petitioner was given three inspections and the opportunity to submit plans of correction and, in addition, the chance to present its case at an informal office conference. Furthermore, an aggrieved facility can always obtain judicial review of the respondent's decision by seeking a writ of mandate as suggested by the court below. (Petition, App. at A-12.)

Petitioner begs the issue when it asserts that although respondent is empowered (let alone mandated) to refuse to enter into a new participation agreement with a facility where deficiencies exist, such a determination could not be made *accurately* without the aid of a hearing. (Petition p. 25.) This assumes that the facility has already established a "property" interest to which the right to a hearing attaches. As discussed *supra,* no such showing has been made here. Moreover, concerns identical to petitioner's regarding the possibility of error or arbitrariness in the decision-making process by governmental personnel, such as health inspectors and their supervisors here, and thus the need for an evidentiary hearing, were discussed and mitigated

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[10]*Contrast, Arnett v. Kennedy,* 416 U.S. 134 (1974).

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in this Court's very recent decision in *Mathews v. Eldridge*, ... U.S. ....., 96 S.Ct. 893 (1976), wherein it was held:

> "The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' (Citation omitted) . . . In assessing what process is due in this case, *substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of the social welfare system* that the procedures they have provided assure fair consideration of the entitlement claim of individuals." (Emphasis added.) 96 S.Ct. at 909.

In fact, were it postulated that petitioner did have a "property" interest to which attached due process requirements, respondent submits that the procedures which it employed would, under the rationale of the *Eldridge* decision, be held to be adequate. While respondent recognizes that the claimant in the *Eldridge* case was always assured of a post-termination hearing, the majority opinion nevertheless focuses on the quality and adequacy of the government's procedures *prior* to such a hearing to determine whether those procedures comport with due process.

When one compares the procedures employed by the government in the *Eldridge* case and those conducted by the respondent in the case at bar, the similarity and quality are striking. In the following summary of the procedures noted in *Eldridge* respondent has included in brackets the correlative procedure avail-

able under the Medi-Cal program, in general, and which were employed in the instant case, in particular:

(a) investigations were conducted by a team consisting of a physician and a nonmedical person, [inspections conducted by a registered health sanitarian and public health nurse, often accompanied by a social worker and pharmacist];

(b) claimant is informed of the results of the investigation and the evidence upon which a decision to terminate benefits is based, [facility is provided with a copy of the inspection report, setting forth the exact state or federal regulations or laws violated];

(c) claimant is afforded the opportunity to submit other evidence in writing, [facility is required to submit a plan of correction];

(d) claimant is invited to seek assistance from local social security administration office, [facility may request that respondent provide consulting services to assist in the identification or correction of deficiencies];[11]

(e) claimant still has access to income from other sources, [facility is free to accept private patients];

(f) claimant may seek reconsideration of termination decision, [facility may reapply for certification as a Medi-Cal provider].

Furthermore, when one balances the private interest against the public interest at stake in the instant case,

[11]California Health and Safety Code § 1280.

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as was similarly done in *Eldridge, supra,* the scales tip overwhelmingly in favor of the latter. As was stated by the court below:

> "The Medi-Cal program was created for the benefit of those eligible to receive assistance under it, and not for the economic advantage of nursing homes which render services to the beneficiaries. This basic premise imposes upon us the duty to interpret the rules applicable to the program in a manner favorable to the beneficiaries . . . a vulnerable and exploited class of persons who are frequently powerless to vindicate their own rights." (Petition App. at A-14, 15.)

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,
N. EUGENE HILL,
Assistant Attorney General,
RONALD V. THUNEN, JR.,
JAMES E. RYAN,
Deputy Attorneys General,
Attorneys for Respondents.

APPENDIX A.

Provisions of Law Involved.

45 C.F.R. § 250.21.

"A State plan for medical assistance under Title XIX[12] of the Social Security Act must provide for agreements with every person or institution providing services under the State plan under which such person or institution agrees. . . ."

22 California Administrative Code § 51215.

"(a) A skilled nursing facility shall be licensed by the Department, or be exempt under State law from licensure; and meet all of the standards set forth herein or be certified as a participating provider of extended care facility services under Title XVIII of the Social Security Act and meet the standards set forth in paragraphs (1), (2), (10), (11) and (12) of this subsection.

". . .

"(12) Enter into a participation agreement with the Department that the facility is in compliance with the provisions of this section. The participation agreement with the Department shall remain in effect no longer than the period of certification established under (a) (12) (B) of this Section or one year whichever is less. New agreements shall be authorized only upon determination by the Department that the skilled nursing facility continues to meet the standards set forth in this Section."

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[12]Otherwise known as the Medicaid Act.

California Health and Safety Code § 1396.

"For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance."

California Welfare and Institutions Code § 14003.

"The Governor may enter into and execute in behalf of the state all necessary agreements in connection with this chapter as may be required by the United States government."

California Welfare and Institutions Code § 14020.

"All sections of this chapter shall remain in operation during such times as grants-in-aid are provided or made available to the state on the basis of a state plan approved by the federal government for medical assistance pursuant to provisions of the Federal Social Security Act, as amended."

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California Welfare and Institutions Code § 14100.1.

"For the purpose of administering this chapter, and Chapter 8 (commencing with Section 14500) of this part, the Secretary of the Health and Welfare Agency shall have those powers and duties necessary to conform to requirements for securing approval of a state plan under the provisions of the applicable federal law."

22 California Administrative Code § 50009.

"If the United States Department of Health, Education and Welfare issues a formal ruling that any section of this Subdivision relating to medical assistance cannot be given effect without causing this state's plan to be out of conformity with federal requirements, the section shall become inoperative to the extent that it is not in conformity with federal requirements."

45 C.F.R. § 249.33(a)(6).

"(a) *State plan requirements.* A State plan for medical assistance under title XIX of the Social Security Act must:

". . .

"(6) Provide that execution of the single State agency provider agreement with a facility for payments under the plan shall be contingent upon certification in accordance with the provisions of paragraph (a)(1) and (2) of this section. The term of an agreement may not exceed a period of one year and the effective date of such agreement may not be earlier than the date of certification. Execution of a provider agreement shall be for the term and in accordance with the provisions of certification determined by the survey agency except that the single State agency for good cause based on adequate and documented evidence

may elect to execute a provider agreement for a term less than the full period of certification or may elect not to execute a provider agreement or may cancel a provided agreement for participation by a facility certified under the State plan. Notwithstanding the provisions of this subparagraph the single State agency may extend such term for a period not exceeding two months where the survey agency has notified the single State agency in writing prior to the expiration of a provider agreement that the health and safety of the patients will not be jeopardized thereby, and that such extension is necessary to prevent irreparable harm to such facility or hardship to the individuals being furnished items or services or that it is impracticable within such provider agreement period to determine whether such facility is complying with the provisions and requirements under the program."

45 C.F.R. § 249.33(a)(4)(i).

"(a) *State plan requirements.* A State plan for medical assistance under title XIX of the Social Security Act must:

". . .

"(4) Provide that certification by the survey agency designated pursuant to § 250.100(c) of this chapter will be subject to the following provisions and exclusions:

(i) For purposes of paragraph (a)(1)(i) of this section, the facility is in compliance with each condition of participation as determined by the manner and degree

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to which the facility satisfies the standards within each condition . . ."

45 C.F.R. § 249.10.

"(b) *Federal financial participation.* Subject to the limitations in paragraph (c) of this section, Federal financial participation is available in expenditures for medical or remedial care and services under the State plan which meet the following definitions:

". . .

"(4)(i) *Skilled nursing facility services (other than such services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older.* "Skilled nursing facility services" means services ordered by and under the direction of a physician provided in a skilled nursing facility (which term includes any institution located on an Indian reservation and certified by the Secretary as meeting the requirements of section 1861(j) of the Act), and which are or were:

". . .

"(C) Provided by a facility or distinct part of a facility which is certified to meet all of the requirements for participation pursuant to § 249.33 as evidenced by an agreement, executed in accordance with the certification provisions of § 249.33, between the single State agency and the facility for the provision of skilled nursing facility services and the making of payments under the plan . . ."

22 California Administrative Code § 51452.

"Violation of any rule or regulation relating to the provision of health care services under the California Medical Assistance Program by any individual, partnership, clinic, group, association, corporation, or institution, or any officer, director, agent, or employee, shall be deemed contrary to public health, safety, welfare, and morals, and to said program and grounds for suspension from the participation in said program."